IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-906

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Petitioner United Air Lines, Inc. (hereinafter "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered October 1, 1976 in Case No. 75-2206, *Harris S. McMann* v. *United Air Lines, Inc.*

## OPINIONS BELOW.

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix hereto at page A1. The Opinion of the Court of Appeals for the Fourth Circuit, dated October 1, 1976, is reported at 542 F. 2d 217. A copy appears in the Appendix at page A5.

## JURISDICTION.

The judgment of the Court of Appeals was entered October 1, 1976. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

## QUESTION PRESENTED FOR REVIEW.

Is the involuntary retirement of an employee prior to age 65 in observance of the terms of a bona fide retirement plan adopted many years prior to passage of the Act permissible without further justification where the Act expressly provides that it is not unlawful for an employer ". . . to observe the terms of a bona fide . . . retirement . . . plan which is not a subterfuge to evade the purposes of . . ." the Act?

## STATUTE INVOLVED.

The Age Discrimination in Employment Act of 1967, as amended,[1] 29 U. S. C. § 621 *et seq.* (hereinafter, "ADEA" or the "Act"), specifically Section 4(f)(2) thereof (29 U. S. C. § 623(f)(2)) which reads as follows:

> "It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual."

## STATEMENT OF THE CASE.

This is an action brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired former employee of United Air

1. The Act was amended April 8, 1974 by the Fair Labor Standards Amendments of 1974 (Public Law 93-259, 88 Stat. 55). The 1974 amendments, however, involve changes irrelevant to this case.



Lines, Inc. (hereinafter "United") requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement by United at age 60 in observance of the terms of a retirement income plan covering him and other employees in his job classification.

The facts were stipulated. McMann was born January 23, 1913 and hired by United April 14, 1944. While with United he held various jobs, his final position at the time of retirement being that of "Technical Specialist—Aircraft Systems", a management position.

When McMann was hired by United in 1944, United had in existence a formal retirement income plan (hereinafter the "Plan") which provided retirement benefits to employees who were eligible to join and who became members of the Plan.[2] These benefits were provided through a group annuity contract entered into between United and two insurance companies. McMann had opportunity to join the Plan on various occasions after he became an employee, but chose not to do so until 1964.

On January 23, 1964, McMann elected for the first time to join the Plan and signed an application card applying to enter the Plan effective February 1, 1964. Thereafter, McMann was sent annual statements concerning the benefits he had accrued under the Plan, each such statement showing that his retirement would occur at age 60.

On January 23, 1973, McMann reached his 60th birthday. On February 1, 1973, the first day of the month following his 60th birthday, McMann was retired in observance of the Plan and commenced to collect retirement benefits.

Shortly before his retirement, McMann served notice on the Secretary of Labor of his intent to sue based upon United's alleged violation of the Act in requiring him to retire at age 60.[3]

2. The Plan was adopted in 1941.

3. McMann, although a management employee at the time of his retirement, held a place on the pilots' seniority roster as a result

*(Continued on next page)*

A representative of the Secretary of Labor, Mr. Robert E. Ferguson, Area Director, U. S. Department of Labor, Richmond, Virginia, met and conferred with representatives of McMann and United in investigating McMann's complaint. Subsequent to these conferences, Mr. Ferguson wrote United's representative on January 18, 1973 stating as follows:

> "This is in further reference to the above styled matter insofar as the Age Discrimination in Employment Act of 1967 is concerned.
>
> Following my conference with you in this office and my earlier conference with Mr. Francis G. McBride, Attorney for Mr. McMann, I referred the issue of your company's pending involuntary retirement of Mr. McMann, to be effective February 1, 1973, to our Regional Attorney at Nashville, Tennessee.
>
> Regional Attorney Marvin Tincher has now advised that the retirement plan of your company is a bona fide employee benefit plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act. Further, he has held, that since the plan was adopted many years prior to the effective date of the indicated Act, it would not appear that the plan is a subterfuge to evade the purposes of the Act.
>
> In view of the above, this office contemplates no further action with respect to this matter and has advised Mr. McBride to that effect and that we are closing our file. Should you have any questions relative to the above, please feel free to write this office."

On January 31, 1975, McMann filed this lawsuit in the U. S. District Court for the Eastern District of Virginia, Alexandria Division. In essence, McMann asserted that his involuntary

*(Continued from preceding page)*

of his holding a union-covered position earlier. In addition to protesting his planned retirement to the Secretary of Labor, McMann filed a grievance under the Pilots' collective bargaining Agreement protesting his involuntary retirement as a breach of the Agreement. The System Board of Adjustment, with Professor Archibald Cox sitting as neutral, denied his grievance without prejudice to McMann's right to pursue his remedy under the Act.



retirement on his 60th birthday constituted an act of age discrimination and was unlawful under the Act. The Complaint requested injunctive relief, reinstatement and back pay. United filed its Answer on March 7, 1975 admitting it retired McMann on his 60th birthday, but raising the defense that McMann was retired at age 60 in accordance with the terms of a *bona fide* employee benefit plan within the meaning of Section 4(f)(2) of the Act and Section 860.110 of the Secretary of Labor's interpretation of the Act.[4]

On July 15, 1975, United and the plaintiff, McMann, entered into a stipulation of the facts. Based thereon, both parties moved for summary judgment on July 25, 1975. On August 1, 1975, the matter came before the District Court and oral arguments were presented. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr. presiding, granted United's motion for summary judgment and denied McMann's motion. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case by filing a brief *amicus curiae*. McMann's position before the Court of Appeals remained essentially the same; namely, that United's action in requiring him to retire at age 60 constituted a violation of the Act in that he was a member of the "protected" age group under the Act and that the purpose of the Act would allegedly be frustrated if United could utilize his membership in the Plan as a means of terminating his active employment at age 60.[5] The Secretary of Labor joined in McMann's position.

4. Section 860.110 reads in relevant part as follows:

> ". . . the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). * * *"

5. McMann also argued that United's Plan did not by its terms provide for *mandatory* retirement at age 60 since it provided for *normal* retirement at age 60. The arbitration award of the System Board of Adjustment (discussed in footnote 3, *supra*), however,

*(Continued on next page)*

United maintained, on the other hand, that the District Court's decision was correct because the Act expressly permits, as an exception to the provision against age discrimination, an employer to ". . . observe the terms of any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act. . . ." United pointed out that its retirement income plan, which provided for retirement at age 60, was a *bona fide* plan paying substantial benefits and since it was instituted many years prior to enactment of the Age Discrimination Act of 1967, it could not possibly be considered a "subterfuge to evade" the purposes of that Act. United relied upon the clear and unambiguous language of § 4(f)(2), the Secretary of Labor's published interpretive regulations and guidelines regarding § 4(f)(2), and the decision of the Court of Appeals for the Fifth Circuit in the case of *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974) as well as other decisions discussed hereinafter, as authority for its position.

Following oral arguments on June 10, 1976, the Court of Appeals in *McMann* rendered a decision on October 1, 1976 in which it explicitly rejected the *Taft* decision and ruled that it is not enough that a retirement benefit plan be *bona fide* and in existence for years prior to the Act. In essence, the Court held that any retirement plan which contains a provision for mandatory retirement earlier than age 65 must be presumed "a subterfuge to evade the purposes" of the Act; that in order to escape condemnation as a "subterfuge," the employer must prove that ". . . [t]here [is] some reason other than age for a plan, or a provision of a plan which discriminates between employees of different ages." (542 F. 2d at 220). Although recognizing that it would be extremely unlikely that United or

*(Continued from preceding page)*

rejected this same argument, pointing out that the established practice at United had been to treat the normal retirement date as a mandatory retirement date. The Court of Appeals also rejected this argument.



any employer could demonstrate an economic[6] or business[7] justification for a mandatory retirement age prior to 65, the Court of Appeals remanded the case to the District Court to permit such a showing. United then filed this Petition for a Writ of Certiorari.

## REASONS THE WRIT SHOULD BE GRANTED.

Conservatively, at least one million workers in the United States are members of retirement plans which provide for mandatory retirement at an age earlier than 65.[8] Clearly, the decision in *McMann*, if permitted to stand, places such plans in probable violation of the Act. Until this Court resolves the question, numerous employers face uncertainty as to the validity of their retirement plans.

The *McMann* decision is without precedent in holding that an admittedly *bona fide* retirement plan in existence for many years prior to passage of the Act will nevertheless be deemed a subterfuge to evade the purposes of the Act if it provides for

6. In connection with an economic justification, the Court of Appeals observed that "Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits . . . Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retiree's." (542 F. 2d at 222 and n. 8).

7. The only business justification suggested by the Court of Appeals for a mandatory retirement age prior to 65 is "where age is a 'bona fide' occupational qualification." (542 F. 2d at 219, n. 3) That situation is, of course, explicitly provided for in another exception to the Act, § 4(f)(1), 29 U. S. C. § 623(f)(1) and, therefore, the Court's interpretation would make § 4(f)(2) redundant and meaningless.

8. Source: 69 Monthly Labor Review 41, 43 (April, 1973). The decision of the Court of Appeals in *McMann*, relying upon the *amicus curiae* brief filed by the Secretary of Labor, indicates that ". . . there are over eleven million employees who are members of retirement plans which require retirement before age 65 and there are another several million who are members of plans which permit forced retirement before age 65." (542 F. 2d at 222).

mandatory retirement at an age earlier than 65, unless the employer also proves some economic or business purpose for such early retirement. Indeed, the *McMann* decision is in direct conflict with the decisions of three circuit courts which have concluded that a *bona fide* retirement plan long predating the Act could not be a subterfuge to evade the Act, *i.e., Brennan* v. *Taft Broadcasting Co., supra, de Lorraine* v. *MEBA Pension Trust, et al.*, 499 F. 2d 49 (2nd Cir. 1974) and *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974), *aff'd.*, No. 74-2604 (9th Cir., Oct. 15, 1975).[9]

The *McMann* decision overrides the plain, unambiguous language of the exemption for retirement plans provided for in Section 4(f)(2) of the Act and does so despite the presence of legislative history which establishes that involuntary retirements under existing bona fide retirement plans were intended to be protected by the exemption. Moreover, the decision in *McMann* represents a complete departure from prior interpretations and regulations issued by the Department of Labor contemporaneously with the Act and which remain in effect today.

As a result, employers subject to the ADEA are currently acting at their peril by following the Secretary's Interpretations —unaware that in litigation his position has changed. Until this court resolves the matter, the uncertainty as to the meaning of the Section 4(f)(2) exemption and the conflict in the circuits will continue.

9. The decision was affirmed by the Ninth Circuit under its Local Rule 21(c) which provides that such "disposition . . . shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit."



## ARGUMENT.

### I.

### United's Plan Complies with the Requirements of the Exemption in Section 4(f)(2) Given Its Ordinary Meaning.

Section 4(a) of the Act prohibits age discrimination among employees in the protected (age 40-65) group by stating in relevant part as follows:

> Sec. 4(a). It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 4(f)(2) of the Act exempts certain employer actions from the requirements of Section 4(a) by providing as follows:

> Sec. 4(f). It shall not be unlawful for an employer . . .—
>
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, execpt that no such employee benefit plan shall excuse the failure to hire any individual . . ."

Given their ordinary meaning, the words "to observe the terms of" which appear in the exemption permit an employer to apply or implement the provisions of his retirement plan. A *"bona fide"* plan is by definition one which is made in good faith without fraud or deceit and which is not specious or counterfeit. As stated by the Fifth Circuit in *Taft, supra,* the term *bona fide* is synonymous with "genuine" or "authentic" (500 F. 2d at 217). A "subterfuge" is by definition "deception by artifice or strategem to conceal, escape, avoid or evade," the

word "evade" meaning to use "craft or strategem in avoidance" (Merriam Webster's Third New International Dictionary, Unabridged). Judicially, "subterfuge" has been defined as "a device, plan, or the like, to which one resorts for escape or concealment; an artifice employed to escape censure or the face of an argument, or to justify opinions or conduct; an evasion." See *Camden Trust Co.* v. *Gidney*, 301 F. 2d 521, 523 (D. C. Cir. 1962); *Los Angeles Fisheries* v. *Crook*, 47 F. 2d 1031, 1035 (9th Cir. 1931). The term "subterfuge" implies a purposeful intent to circumvent or evade.

United's Plan clearly meets the definition of *"bona fide"* and, just as clearly, is not a "subterfuge to evade" the purposes of the Act. United's plan, which McMann and the Secretary of Labor concede is *"bona fide,"* was entered into in 1941 in good faith without fraud or deceit. It provides for and has paid substantial retirement benefits to a broad class of workers and it is neither "specious" nor counterfeit. Further, since it was entered into over twenty-five years before the Act was passed, the Plan could not be a "subterfuge to evade" the Act or its purposes. One cannot create a device to "evade" that which does not exist.

Although both the terms *"bona fide"* and "not a subterfuge to evade" are used in Section 4(f)(2), they realistically do not appear to have separate meanings. The Wisconsin Supreme Court noted this fact in analyzing state age discrimination laws some of which, like those in Wisconsin and New York, permit employers to retire employees in observance of the terms of retirement plans which are not "subterfuges" and others which permit employers to retire employees in observance of the terms of *"bona fide"* plans. The Wisconsin Court concluded in the case of *Walker Manufacturing Co.* v. *Industrial Commission*, 27 Wis. 2d 669, 135 N. W. 2d 307, 315 (Sup. Ct. 1965) that:

> "We are satisfied that there is no essential difference between an age discrimination statute proviso phrased in terms of retirement policies or systems that are not a subterfuge, such as contained in [Wisconsin law] . . . and the corresponding provisions of age discrimination statutes which speak in terms of 'bona fide' retirement or pension plans."



Since United's Plan is conceded to be *"bona fide"* in this case, it logically follows that it cannot be a "subterfuge" to evade the purposes of the Act.

## II.

## The Department of Labor's Published Interpretations and Opinions Support the Proposition That Involuntary Retirements at Any Age Are Permissible as Long as the Express Language of the Act Is Followed.

The Wage and Hour Administrator of the Department of Labor, who is charged with administering the Act, issued interpretations of the Act starting on June 18, 1968, six days after the Act became effective, which interpretations were published in the Federal Register and codified at 29 CFR § 860 *et seq.* In relevant part, as amended in 1969, the interpretations read as follows:

> *"Sec. 860.110 Involuntary Retirement before age 65*—(a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in Section 4(f)(2) is concerned.***"

Opinions issued by the Department of Labor's Wage-Hour Administrator have consistently reiterated this position. For example, in an opinion letter dated November 15, 1968, the Administrator stated:

> "This exception [§ 4(f)(2)] does not apply, however, to the involuntary retirement before age 65 of employees who are not participants in the employer's pension programs. *Thus, for example, in the case of employees who are participants in your client's pension plan, such employees may be retired involuntarily before age 65, but employees who are not participants in the plan may not be so retired.* Opinion ADEA 100, Nov. 15, 1968 (Emphasis added.)

It is significant to note that no official, published interpretation or opinion issued by the Administrator indicates that the words of Section 4(f)(2) have other than their ordinary meaning. Nowhere does the Administrator state in his official publication or opinions that in order for an involuntary retirement provision of a plan to meet the requirements of Section 4(f)(2), that provision must be shown to be based on business or economic factors. It was not until cases involving involuntary retirements were in litigation and in recent reports to Congress that this new definition of a "subterfuge to evade" the purposes of the Act was revealed—and then not in the context of official, published interpretations, but rather in court documents or reports to Congress. In fact, those provisions of the Interpretative Bulletin quoted above remain the Administrator's officially published Interpretations to this very day.

It is generally recognized that the interpretations of a statute by the agency empowered to administer that statute are normally entitled to great deference *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434-35 (1971) and *Hodgson* v. *American Hardware Mutual Ins. Co.*, 329 F. Supp. 225, 228-9 (D. C. Minn. 1971); however, as this Court made clear in its recent decision in *General Electric* v. *Gilbert, et al,* ..... U. S. ....., 45 U. S. L. W. 4031, 4036 (1976), a second interpretation contradicting an earlier one issued contemporaneously with the enactment of the statute is not entitled to "high marks" and this



Court has appropriately declined in the past to defer to administrative guidelines where they conflicted with earlier pronouncements of the agency. In the case at hand, the position newly enunciated by the Secretary of Labor to the Courts and Congress clearly interprets Section 4(f)(2) differently than its original interpretation issued contemporaneously with the Act. The Fourth Circuit, in accepting the second "interpretation" rather than the earlier interpretation improperly accorded undue weight to such "interpretation."

III.

**The Legislative History of the Act Supports the Legality of Involuntary Retirements Prior to Age 65 When Made Pursuant to a Bona Fide Pension Plan.**

In his *amicus curiae* brief to the Court of Appeals in *McMann*, the Secretary asserted that ". . . involuntary retirement was never once mentioned during the Congressional debates." (Secretary's brief, p. 19). Contrary to this assertion, the legislative history establishes that involuntary retirements were discussed and in fact intended to be covered by the Section 4(f)(2) exemption.

The bill introduced by the Administration (Senate Bill 830, 90th Congress, 1st Session 1967) was introduced on February 3, 1967 by Senator Yarborough. It provided in Section 4(f) that:

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (2) To *separate involuntarily an employee under a retirement policy* or *system* where such *policy* or *system* is not merely a subterfuge to evade the purposes of this Act . . ." (Emphasis added).

Secretary Wirtz testified at the Senate Hearings on the effect of the exemption in the Administration Bill:

> "Mr. Secretary, in your opinion, what will be the effect of this legislation on the many private pension and insurance plans now in effect?

> Secretary WIRTZ. It would be my judgment, Senator Fannin, that the effect of the provision in section 4(f)(2) which appears on page 6 is to protect the application of almost all plans which I know anything about.
>
> There is that problem specifically recognized and it is provided in that section that 'It shall not be unlawful to separate involuntarily an employee under a retirement system where such policy or system is not merely a subterfuge to evade the purposes of that act.'
>
> It is intended to protect retirement plans." Senate Hearings at 53.

Senator Javits, the Senator from New York, expressed concern during the Senate hearing on the Bill that the exemption in the Administration's Bill did not go far enough—that in addition to involuntary retirement, it should be broad enough to exempt an employer from the requirement that he add a newly hired older worker to his retirement or pension plan. As stated by Senator Javits:

> "We must also be sure that the law which is passed does not in practice encourage rather than discourage discrimination against older workers. One of the problems which must be faced in this connection concerns the operation of established pension plans, some of which provide benefits based to a certain extent on the age of the employee when first hired.
>
> *"The Administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem.* It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters."[10]

10. Hearings on S. 830 before Subcommittee on Labor of the Committee on Labor and Public Welfare, 90th Cong. 1st Sess. at 24 (1967) (prepared statement) (Emphasis added).



To meet these needs, Senator Javits proposed:

> ". . . that a fairly broad exemption be provided for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." [11]

The Subcommittee referred the Administration Bill with suggested changes to the full Committee and on November 4, 1967, an amendment in the nature of a substitute to the Administration Bill was reported by the Committee. This became the amended S. 830, the Senate Committee Bill, which was subsequently enacted into the Act.

It is apparent from the testimony of Senator Javits, above, that he *agreed with* the Administration's concept of permitting the involuntary retirement of employees under a retirement policy or system, but he wanted to *broaden* that exemption. Section 4(f)(2), as enacted, represents the *broadened* exemption and by its very terms permits an employer to observe the terms of a retirement plan in *all* its aspects, *including* involuntary retirements at any age pursuant to such a plan.

## IV.

## Other Court Decisions Have Rejected the Theory of the McMann Decision.

The leading decision on the matter of involuntary retirements under the Act is the decision rendered by the Court of Appeals for the Fifth Circuit in *Brennan* v. *Taft Broadcasting Co., supra.* In *Taft*, a 47 year old employee joined his employer's retirement plan in 1963. That plan required members to retire at age 60, the normal retirement age. In June, 1970, at which time the employee reached his 60th birthday, he was involuntarily retired. Thereafter, suit was filed under the Act seeking injunctive relief and damages as a result of his forced retirement. The District Court ruled against him and the Court of Appeals affirmed its judgment.

11. *Id.* at 28 (extemporaneous remarks).

In affirming the lower court's judgment, the *Taft* Court rejected the argument that the employer's plan did not come within the Section 4(f)(2) exception. The Court stated that Taft's plan was *bona fide* because it existed, was genuine and authentic and paid substantial benefits. It also stated (500 F. 2d at 215):

> "Does the defendant-appellee's 'Plan' come within the terms and purposes of the Section 4(f)(2) exception?
>
> "We respond in the affirmative.
>
> "Taft's 'Plan' was instituted in 1963. Jones exercised his option to participate in 1963. The Act was approved December 15, 1967. Quite obviously, Congress sought to avoid legal and constitutional problems likely to arise from any ex post facto effort to invalidate existing employee benefit plans. Consequently, it included the Section 4(f)(2) exception.
>
> "Its language is plain: 'a bona fide *employee benefit plan* such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter [emphasis ours]'. The key phrase is 'employee benefit plan.' The words, 'retirement, pension, or insurance,' are added in a clearly description sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any.
>
> "Taft's 'Plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."

The Court in *Taft* also rejected the argument that the Section 4(f)(2) exception was available only if there was a "cost" impact on the employer, as urged by the Secretary of Labor. As stated by the *Taft* Court (500 F. 2d at 217):

> "The primary difficulty [with this approach] is that it attempts to use legislative history to override the unambiguous language of the statute."

The *Taft* Court pointed out that "the statutory language should serve the function of indicating prohibited conduct and



that it is 'hardly reasonable' to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine "whether what a statute plainly says is what it really means" (*Id.* at 217).

In *de Lorraine* v. *MEBA Pension Trust*, 499 F. 2d 49 (2nd Cir. 1974), a case decided approximately three months before *Taft*, the Second Circuit Court of Appeals stated: (499 F. 2d at 50):

> "The Age Discrimination in Employment Act provides that it shall not be unlawful for a labor organization 'to observe the terms of . . . any bona fide employee benefit plan such as a . . . pension . . . plan, which is not a subterfuge to evade the purposes of this chapter. . . .' 29 U.S.C. § 623(f)(2). MEBA Pension Trust was established in 1955, long before the passage of the Act, and pays substantial benefits to a broad class of workers. *Thus, the trust is certainly not itself a subterfuge to evade the purposes of the statute. . . .*" (Emphasis added.)

And in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974), *affirmed* No. 74-2604 (9th Cir., Oct. 15, 1975), the plaintiff baseball umpire contended that the retirement income plan for umpires which called for retirement at age 55 was a subterfuge to avoid the purposes of the Act. Rejecting this contention, the District Court stated (377 F. Supp. at 948):

> "Of course, this Retirement Plan was put into practice long before there was any proscription against employment practices where discrimination because of age was found. *Obviously it could not have been evolved in an attempt to circumvent any public policy or law.*"

In *Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Haw. 1976), appeal docketed, No. 76-..... (9th Cir. 1976), the Court upheld the involuntary retirement of an employee who was covered by a retirement plan providing for retirement at age 60. The Court ruled that the plan in question was a *bona fide* employee benefit plan within the meaning of Section 4(f)(2)

and was not a subterfuge to evade the purpose of the Act because the plan was one which paid substantial benefits.

And in *Dunlop* v. *General Telephone Co.*, ____ F. Supp. ....., 13 FEP Cases 1210, appeal docketed, No. 76-2371 (9th Cir., 1976), the Secretary of Labor filed suit alleging that the defendant telephone company's action in involuntarily retiring seven employees prior to age 65 in accordance with the terms of a retirement plan violated the Act. In that case, the right of defendant unilaterally to retire salaried employees who were eligible for early retirement had been in the Plan continuously since 1929. Whether employees were retired early or not made no material difference in the financing of the Plan. The Secretary of Labor conceded that the plan in question was not a subterfuge to evade the purposes of the Act. The District Court found for the defendant stating, in relevant part in its conclusions of law that (13 FEP Cases at 1212-13):

> "6. The Section 4(f)(2) exception is clear and unambiguous and legislative history may not be used to override the plain meaning of the statutory exception . . ." (citing *Taft* and *Steiner*)
>
> "7. In any event, neither the language of the statute nor the legislative history of the statutory exception support plaintiff's theory that the exception narrowly be limited to only those pension plans which would suffer a financial burden should the exceptions not apply to them.
>
> "8. The . . . Plan . . . which is both authentic and genuine, is bona fide within the meaning of the Section 4(f)(2) exceptions of the Age Discrimination in Employment Act of 1967 . . ." (citing *Brennan*)
>
> • • • • •
>
> "10. Plaintiff admits, and the Court so finds, that the . . . Plan . . . is not a subterfuge to evade the purposes of the Age Discrimination in Employment Act of 1967.
>
> "11. The . . . Plan . . . falls within the Section 4(f)(2) exception and defendant's retirement of the seven individuals was not unlawful and did not violate the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621, et seq."



In *McGovern* v. *United Air Lines, Inc.*, ..... F. Supp. ....., Civil Action 75 C 309 (N. D. Ill. 1975), a case involving a United Flight Navigator involuntarily retired at age 60 pursuant to United's retirement income plan, the plaintiff Navigator made essentially the same arguments concerning his retirement being a violation of the Act as did McMann. The District Court rejected these arguments, stating, in relevant part, that (Slip Opinion, p. 6):

> ". . . The normal retirement date for flight navigators under the plan . . . has been age 60 since 1948. It is clear from this chronology that the plan in question substantially predates the Age Discrimination Act of 1967. We hold, accordingly, that it is a bona fide plan which was not adopted to evade the purposes of the Act."

See, also, *McKinley* v. *Bendix Corporation*, 420 F. Supp. 1001 (W. D. Mo. 1976), *Stringfellow* v. *Monsanto Co.*, 320 F. Supp. 1175 (W. D. Ark. 1970) and *Grossfield* v. *Saunders Co.*, ____ F. Supp. ____, 1 FEP Cases 624 (S. D. N. Y. 1968).

## CONCLUSION.

For the reasons stated above, United respectfully requests this Court to grant its petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ARNOLD T. AIKENS,
KENNETH A. KNUTSON,
EARL G. DOLAN,
*Attorneys for Petitioner.*

December 30, 1976.

# APPENDIX.

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IN THE UNITED STATES DISTRICT COURT,
For the Eastern District of Virginia,
Alexandria Division.

HARRIS S. McMANN,
*Plaintiff,*
*vs.*
UNITED AIR LINES, INC.,
*Defendant.*

Civil Action
No. 72-75-A

## ORDER GRANTING SUMMARY JUDGMENT.

This matter having come on for hearing before the Court on August 1, 1975, on cross-motions for summary judgment, the Court having read and considered the pleadings and having heard oral argument of counsel for the respective parties makes the following findings of fact as stipulated to by the parties:

## FINDINGS OF FACT.

1. Defendant is and at all times material hereto has been an Employer within the meaning of the Age Discrimination in Employment Act of 1967.

2. Plaintiff was born on January 23, 1913.

3. Plaintiff was hired by Defendant on April 14, 1944 and served Defendant in various capacities, most recently as a "Technical-Specialist—Aircraft Systems."

4. At the time Plaintiff was hired by Defendant on April 14, 1944, Defendant had in existence a formal retirement income plan (hereinafter referred to as the "Plan") which pro-

vided for benefits to employees who joined the Plan. These benefits were arranged through a group annuity contract issued jointly by Connecticut General and John Hancock Mutual Life Insurance Companies.

5. Participation in the Plan by employees was purely voluntary.

6. From time to time during his employment, prior to 1964, Plaintiff was given opportunity to join the Plan, but elected not to do so. On December 18, 1950, Plaintiff signed a card acknowledging that he was offered opportunity to join the Plan and declined.

7. On January 23, 1964, Plaintiff elected for the first time to participate in the Plan as applicable to non-union flight employees and signed an application card applying to join the Plan effective as of February 1, 1964. The application card signed by Plaintiff shows on its face that the normal retirement age for employees in his classification was age 60.

8. In 1965, employees in Plaintiff's job classification were transferred from that part of the Plan applicable to non-union flight employees to that part of the Plan applicable to union flight employees. No change was made in the normal retirement age of 60 as applicable to Plaintiff.

9. Plaintiff was retired on the first day of the month following the date of his 60th birthday; *i.e.*, he was retired on February 1, 1973.

10. On an annual basis from the time he joined the Plan in 1964 until he retired in 1973, Plaintiff received a statement showing his estimated benefits under the Plan at the time of his retirement. In each statement sent to him in each year from 1964 until 1973, reference was made—and his estimated earnings were calculated—on a retirement age of 60.

11. From time to time Defendant sends to its employees information booklets describing the salient features of the Plan as applicable to them. Plaintiff was among those sent copies



of the booklets describing the Plan. In each case, the booklet sent Plaintiff described the normal retirement age as age 60.

12. Plaintiff has collected benefits under the Plan since his retirement on February 1, 1973. These benefits varied in amount depending on the value of the units in the Plan.

13. In March, 1973, Plaintiff was given supplemental payments by Defendant.

14. Plaintiff filed a grievance with the Defendant claiming his involuntary retirement violated provisions of the Pilots' collective bargaining agreement. His grievance was denied in arbitration.

15. Plaintiff filed notice of intent to sue Defendant with the Secretary of Labor pursuant to the Age Discrimination in Employment Act of 1967. Following conferences between representatives of the Department of Labor and attorneys for Plaintiff and Defendant, the Department's regional attorney wrote Plaintiff and Defendant and advised the parties that the retirement income plan of Defendant "is a bona fide employee plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act."

16. Plaintiff filed his notice of intent to sue Defendant more than 60 days prior to the commencement of his lawsuit.

17. That the plaintiff was covered by the Age Discrimination in Employment Act of 1967, 29 USC § 621 *et seq.* amended by P. L. 90-202 effective May 1, 1972.

18. Title 29 USC § 623(f)(2) expressly provides that it shall not be unlawful for any employer:

> ". . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

19. Plaintiff was retired in accordance with the terms of such a bona fide benefit plan within the meaning of Title 29 USC § 623(f)(2).

Accordingly, the Court concludes as follows:

## CONCLUSIONS OF LAW.

1. That there are no material issues of fact and defendant, United Air Lines, Inc., is entitled to judgment as a matter of law.

## ORDER.

It therefore this 2nd day of September, 1975,

ORDERED, That the plaintiff's motion for summary judgment be and the same hereby is denied and it is further,

ORDERED, That the defendant's motion for summary judgment be and the same is hereby granted and it is therefore,

ORDERED, That the Complaint herein be and the same hereby is finally dismissed.

[Illegible]
*Judge*.

## CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, to Francis G. McBride, Esquire, Attorney for Plaintiff, Suite 911, 7900 Westpark Drive, McLean, Virginia 22101, this 13th day of August, 1975.

/s/ JOSEPH A. RAFFERTY, JR.
Joseph A. Rafferty, Jr.



UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

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No. 75-2206

---

HARRIS S. McCANN,
*Appellant,*

*vs.*

UNITED AIR LINES, INC.,
*Appellee.*

---

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

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Argued June 10, 1976—Decided October 1, 1976

---

Before HAYNSWORTH, *Chief Judge* and
WINTER and CRAVEN, *Circuit Judges*.

---

Francis G. McBride for Appellant, Carin Ann Clauss, Associate Solicitor, U. S. Department of Labor (William J. Kilber, Solicitor of Labor, Jacob I. Karro, Attorney, U. S. Department of Labor on brief) as Amicus Curiae; Joseph A. Rafferty, Jr. (Earl G. Dolan on brief) for Appellee.

---

WINTER, *Circuit Judge:*

This appeal presents a narrow issue: Does the Age Discrimination in Employment Act, 29 U. S. C. §§ 621, *et seq.*, proscribe the retirement of an employee at age 60 when the retire-

ment is brought about solely because of his membership in an employees' retirement plan which contains a provision making retirement mandatory at that age and when the effective date of the retirement plan preceded the effective date of the Act? The answer to the question turns on whether a preexisting pension plan which requires retirement prior to age 65 falls within the exception contained in 29 U. S. C. § 623(f)(2), "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employees benefit plan . . . which is not a subterfuge to evade the purposes [of the Act]." The district court thought the exception applicable, relying principally on *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974). Despite *Brennan* and other authorities, we conclude otherwise. We reverse the summary judgment awarded the employer and remand the case for further proceedings.

## I.

The relevant facts are largely stipulated. McMann was hired by United Airlines (United) in 1944, and served in various capacities, most recently as a "Technical-Specialist-Aircraft Systems," until his retirement on February 1, 1973. At the time McMann was hired, United had in effect an employee retirement plan, participation in which was voluntary at the option of employee.[1] Initially, McMann decided not to join the plan. However, in 1964, he elected to participate. The application card he signed, and subsequent documents he received, showed

1. We attach no significance to the fact that McMann could have chosen not to join the plan. Realistically, an employee's decision whether or not to forego lucrative benefits, funded in part by employer contributions he would not otherwise receive, is not "voluntary" in the sense we think it would have to be in order to find a waiver of statutory protection. Moreover, we doubt that Congress intended employees and employers, either individually or in collective bargaining, to be able to waive rights granted by the Act. There is little question that an attempt to condition employment itself on the surrender of protection against discharge because of age would be legally ineffectual; we see no reason why participation in a retirement plan should be treated differently.



that the "normal retirement age" for employees in his job category was 60.

While the meaning of the word "normal" in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the "normal" retirement age. United legally may retain employees such as McMann past age 60, but has never done so: its policy has been to retire all employees at the "normal" age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.[2]

McMann was retired at age 60, in compliance with the plan. It is conceded that the plan is "bona fide" in the sense that it exists and pays benefits. United presented no evidence, however, to show that the provision of its plan requiring retirement at age 60 had any purpose other than arbitrary age discrimination. It sought and obtained summary judgment solely on the theory that since its plan was indisputably adopted prior to the effective date of the 1967 Act, (June 12, 1968) the mandatory retirement provision contained therein was not proscribed.[3]

2. If we were to treat the plan as one permitting United to retire employees at age 60 or later, at its option, we would face the situation confronted by the court in *Brennan, supra.* There, Judge Tuttle argued forcefully in dissent that, "at the very least," to qualify for the exemption early retirement pursuant to a plan would have to be *compulsory* on both the employee and the employer. 500 F. 2d at 220. Judge Tuttle drew support for this conclusion from the statutory language, "it shall not be unlawful for an employer . . . to *observe* the terms of a bona fide" plan. (Emphasis added.) Arguably, if under a plan the employer has discretion not to retire an employee, the employee's discharge is not action taken "to observe" the terms of the plan.

3. Our reversal of United's summary judgment does not finally decide this case even though most of the operative facts have been stipulated. United may have other valid defenses. For example, we note that the Act provides another exemption where age is a "bona fide occupational qualification." 29 U. S. C. § 623(f)(1). United may raise this defense on remand. Of course, we express no opinion

*(Continued on next page)*

## II.

The Age Discrimination in Employment Act generally prohibits an employer from discharging any individual between the ages of 40 and 65 because of age. 20 U. S. C. §§ 623(a)(1), 631. However, as previously stated, 29 U. S. C. § 623(f)(2) provides an exemption from this broad rule.[4] In pertinent part, that section provides that

> [i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

The only reported appellate decision to construe this section is *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974), decided over a sharp dissent by Judge Tuttle.[5] The

as to its applicability to McMann, whose principal duties apparently did not involve flying airplanes, but were managerial in nature. We note, however, that the burden of proving the elements required for invocation of any statutory exemption will be on United. *Cf.* Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 232 (5 Cir. 1969) (burden on employer to show existence of elements required for bona fide occupational qualification exception under Title VII of the Civil Rights Act of 1964.)

4. United draws our attention to the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which states that "the Act authorizes involuntary retirement irrespective of age." By its terms, this regulation is interpretive, not legislative. *See* 29 C. F. R. § 860.1 (views subject to change in light of court decisions or reexamination by Department of Labor). As evidenced by the Secretary's amicus curiae brief and argument, he has now concluded that the statement in the regulations is erroneous. As we understand the Secretary's present position, it is substantially in accord with the result we reach here. Thus, the regulation has no significance for our decision. We express no opinion as to whether it may provide the basis of a defense under 29 U. S. C. §§ 259, 626(e).

5. See note 2, *supra*.

Four other reported cases have discussed the benefit plan exemption. de Loraine v. Meba Pension Trust, 499 F. 2d 49 (2 Cir.),

*(Continued on next page)*



*Brennan* majority rested its holding on a reading of the "unambiguous language of the statute," 500 F. 2d at 217, and thus disregarded the legislative history and policy considerations which it conceded might support a different result. We believe the language of the statute is clear, but that the *Brennan* court's interpretation of it is erroneous.

*Brennan's* only discussion of the "subterfuge" clause in the statute is as follows:

> Taft's "Plan" was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion. 500 F.2d at 215.

We find this statement unconvincing because what is forbidden is not a subterfuge to evade the *Act*, but a subterfuge to evade the *purposes* of the Act. These purposes are clearly spelled out in 29 U. S. C. § 621(b), and speak to concerns older than the Act itself:

> It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

*(Continued from preceding page)*

*cert. denied*, 419 U. S. 1009 (1974), did not deal with the issue presented here. The court explicitly stated: "We also decline to consider at this time the argument of amicus curiae . . . that the Act prohibits involuntary retirement pursuant to a pension plan before age 65. As noted in text, plaintiff did not take this position in the district court." 499 F. 2d at 51 n. 7.

Language in Hodgson v. American Hardware Mutual Ins. Co., 329 F. S. 225 (D. Minn. 1971), which tends to support United's position, is plainly dictum. The court stated at the outset of its opinion: "The parties agree that the Plan [is] a bona fide employee benefit plan within the meaning of . . . the Act." 329 F. S. at 227.

Steiner v. National League of Professional Baseball Clubs, 377 F. S. 945 (C. D. Cal. 1974), is contrary to our decision. But *Steiner* offers no analysis and relies heavily on the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which is no longer relevant in light of the Secretary's present position. See note 4, *supra*.

The fourth case, Dunlop v. Hawaiian Tel. Co., .... F. S. .... (D. Hawaii, June 23, 1976), is discussed in n. 6, *infra*.

Thus, in order to qualify for the exemption, a plan must not be a subterfuge to evade the Act's purpose of prohibiting arbitrary age discrimination. Stated otherwise, there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages. At this stage of the proceedings, United has offered no non-arbitrary justification for the age 60 retirement provision in its plan.

Any other reading of the "subterfuge" clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise-qualified individual, for 29 U. S. C. § 623(f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual . . ." "[C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old." *Hodgson*, 329 F. S. at 229.

III.

The result we reach is fully consistent with the legislative history. While it is often said that resort to legislative history is inappropriate where the statute is clear on its face,

> when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' United States v. American Trucking Assns., 310 U.S. 534, 543-44 (1940) (footnotes omitted), *quoted with approval in* Train v. Colorado Public Interest Research Group, Inc., ..... U.S. ....., ..... (No. 74-1270, June 1, 1976).

The joint House-Senate report on the section of the age discrimination bill that was to become 29 U. S. C. § 623(f)(2) states:

> It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to empasize the primary purpose of the bill—



> hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. H. R. Rep. 805, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Adm. News, 2213, 2217.

Thus, Congress in drafting the exemption was concerned that requiring equal participation in employee benefit plans by newly-hired older workers could discourage the employment of such workers, since their age would not permit them to accumulate the years of service necessary to make participation in the plans economically feasible. The fact that the exemption contains the proviso "that no such employee benefit plan shall excuse the failure to *hire* any individual" (emphasis added) confirms that Congress was addressing itself to the problem of the worker hired later in his career, and did not intend to validate plans which discriminate on the basis of age against employees such as McCann who have "earned" their benefits through many years of plan membership.

Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees "to observe the terms of" a plan. However, as we have already observed, in order to escape condemnation as a "subterfuge," an early retirement provision must have some economic or business purpose other than arbitrary age discrimination.

At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the *Brennan* court's conclusion that any action required by a plan predating the Act is valid, since such a plan could never be a subterfuge. While we have already pointed out the fallacy

in this reasoning, it is also refuted by the legislative history. The report states that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans *differently*, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the *maintenance* of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail. United has offered no justification for maintaining its early retirement provision after the Act became effective.[6]

Our reading of the statute and its legislative history is a realistic one. There are over eleven million employees who are members of retirement plans which require retirement before age 65; there are another several million who are members of plans which permit forced retirement before 65.[7] We think it

6. *Brennan's* conclusion that the subterfuge clause automatically validates the provisions of all pre-Act plans was rejected in Dunlop v. Hawaiian Tel. Co., note 5, *supra*, for much the same reason we discuss in the text. However, the *Dunlop* court upheld a plan permitting involuntary retirement at age 60, based upon an admittedly disingenuous reading of the word "subterfuge" to mean a scheme to retire employees early without payment of substantial benefits. The court felt compelled to reach this result in order to give effect to the Secretary of Labor's interpretative regulation, 29 C. F. R. § 860.110, discussed in note 4, *supra*, which it presumed to mirror congressional intent. The court nevertheless observed that Congress might have intended to allow the exclusion of the aged from a retirement plan but not permit the discharge of aged individuals pursuant to a plan, as we have concluded, in which case "subterffuge" could be given its normal meaning. Apparently the *Dunlop* court did not have the benefit of the Secretary's revised position. Accordingly, to the extent that *Dunlop* relied on the regulation, its authority is weakened.

7. *See* U. S. Dept. of Labor, Monthly Labor Review, Vol. 69, No. 4, p. 41 (April 1973).



unlikely that Congress intended to leave the vast loophole in this broad remedial legislation which United would have us fashion. We can foresee no pernicious effects on the nation's employee benefit plans from our decision. Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits.[8] If legitimate considerations other than an employer's preference for youth justify the forced retirement of employees before age 65, 29 U. S. C. § 623(f)(2), as we construe it, permits such action.

REVERSED AND REMANDED.

8. Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees. M. Bernstein, The Future of Private Pensions, 226 (1964).

## STATUTE.

Sections 4(a) and 4(f) of the Age Discrimination in Employment Act of 1967

"Section 4(a) [29 U. S. C. § 623(a)]: It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act."

"Section 4(f) [29 U. S. C. § 623(f)]: It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause."



## INTERPRETIVE REGULATION OF WAGE-HOUR ADMINISTRATOR U. S. DEPARTMENT OF LABOR.

Title 29, CFR "LABOR", Chapter V "Wage and Hour Division, Department of Labor" Subchapter C,—"Age Discrimination in Employment" Part 860, Section 860.110.

"Sec. 860.110 INVOLUNTARY RETIREMENT BEFORE AGE 65.

(a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.

(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress."

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC., *Petitioner,*

v.

HARRIS S. MCMANN, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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OCTOBER TERM, 1976

No. 76-

UNITED AIR LINES, INC., *Petitioner,*

v.

HARRIS S. MCMANN, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

### INTEREST OF THE AMICUS *

The Chamber of Commerce of the United States of America [hereinafter "the Chamber"] is a federation consisting of a membership of over thirty-six hundred (3,600) state and local chambers of commerce and professional and trade associations and a direct business membership in excess of sixty thousand one hundred (60,100). It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to ren-

* Consents of the parties to the filing of this brief have been obtained, and letters reflecting such consents are on file in the Office of the Clerk.

der such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant fair employment matters before this Court. *E.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971)

The issue in this case, whether employees may be retired mandatorily pursuant to bona fide retirement plans, is of major interest to the Chamber's membership. The amount of money invested by the Chamber's members in pension plans and retirement systems is enormous. Many of the terms of those plans and systems would be invalidated or imperilled by the decision of the court of appeals in this case. Moreover, that decision would essentially deny all employers the option to reduce the mandatory retirement ages for their employees below 65 years, however substantial the benefits they provide.

These issues were also of great importance to the Chamber's members in 1967 when Congress was considering the legislation which is interpreted by the court below. As a result, the Chamber testified before both the Senate and House subcommittees.[1] In fact, the Chamber and others pointed out to both subcommittees the danger that this legislation might be interpreted in much the same manner as the court of appeals has interpreted it here. As a result, the bill was amended to make it explicit that age-related provisions (including mandatory retirement provisions) in pension, retirement, health and insurance plans would not be invalidated by the statute.

[1] *Hearings on S. 830 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 90th Cong., 1st Sess. 105-44 (1967); *Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor,* 90th Cong., 1st Sess. 60-76 (1967).



Because a decision of this Court to deny the petition for certiorari would have a substantial adverse impact on the employee benefit plans of many of the Chamber's members, the chamber supports the petition for a writ of certiorari in this case.

## QUESTION PRESENTED

What is the standard for determining whether a employee benefit plan which requires retirement of employees prior to age 65 is a "subterfuge to evade the purposes" of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* (1970) [hereinafter, "ADEA" or "the Act"], under section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) (1970)?

## STATEMENT OF THE CASE

The respondent, an employee of petitioner, United Air Lines, Inc., was terminated when he reached age 60 under an employee retirement plan which required all employees to retire at that age. Respondent filed an action claiming that his forced retirement violated the ADEA. The district court granted summary judgment for the petitioner because it considered the petitioner's action to be authorized under section 4(f)(2) of the ADEA, which states that, "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employee benefit plan . . . which is not a

subterfuge to evade the purpose [of the Act]" 29 U.S. C. § 623(f)(2) (1970) [hereinafter, "section 4(f)(2)"].

The district court's decision was based largely on its finding, later stipulated, that petitioner's plan was "bona fide" and on the Fifth Circuit's decision in *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), which held that Taft's adoption of its plan long before enactment of ADEA, eliminated "any notion that it was adopted as a subterfuge for evasion." 500 F.2d at 215.

On appeal, the Fourth Circuit reversed the district court [2] and explicitly rejected the decision in *Taft*. It held that the section 4(f)(2) exemption is available only if the employer can prove that there is no evasion of the *purposes* of the Act, that one of the principal purposes of the Act was to prohibit arbitrary age discrimination, and, therefore, that a mandatory early retirement provision "must have some economic or business purpose" independent of age if it is not to be considered a subterfuge. 542 F.2d at 221.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The decisions of other circuit courts on the lawfulness of mandatory early retirement plans are clearly in conflict with that of the Fourth Circuit in this case. In *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), the Fifth Circuit held that mandatory retirement of an employee at age 60 pursuant to a profit sharing retirement plan did not violate the Act. In holding that the employer's action was exempted by section 4(f)(2), the court disposed of the argument that

[2] McMann v. United AirLines, Inc., 542 F.2d 217 (4th Cir. 1976).



Taft's plan was a subterfuge for age discrimination by noting that it was adopted "far in advance of the enactment of the law." 500 F.2d at 215. The Fifth Circuit was similarly unimpressed with the arguments that Congress had intended to limit the section 4(f)(2) exemption to situations in which employers could show undue hardship and that the exemption required the rehiring of individuals lawfully retired pursuant to its terms. The Fifth Circuit declared there were several reasons for rejecting the first argument, but "[t]he primary difficulty is that it attempts to use legislative history to *override* the unambiguous language of the statute." *Id.* at 217. As for the second argument, the Court declared that, "[i]f retired employees must be rehired immediately, the right to insist on compliance with a plan is an illusion. Congress could not have possibly intended, or directed, such a contradictory, irreconcilable result." *Id.* at 218.

In the instant case, the Fourth Circuit disagreed with each of the conclusions of the Fifth Circuit. It held that mandatory early retirement plans adopted before as well as after the Act are unlawful absent a showing of special economic or business justification[3] and that Congress did not intend section 4(f)(2) "ever to excuse

[3] The *amicus* agrees with the Fourth Circuit's view that section 4(f)(2) should not be construed as treating plans adopted prior to the Act differently from those adopted subsequent thereto. It submits that the proper interpretation is that contained in the published interpretations of the Secretary of Labor and the initial opinions of the Wage and Hour Administrator which permit post- as well as pre-Act plans to provide for mandatory early retirement. See 29 C.F.R. § 860.110 (1976), published at 33 Fed. Reg. 12227-28 (1968) and 34 Fed. Reg. 322 (1969); *e.g.*, ADEA Opinions, Wage and Hour Administrator Clarence T. Lundquist, August 14, 1968, September 6, 1968, and November 15, 1968; ADEA Opinions, Acting Wage and Hour Administrator Ben P. Robertson, April 29, 1969 and April 16, 1970; ADEA Opinion, Wage and Hour Assistant Administrator Francis J. Costello, June 29, 1971.

the failure to hire *or the discharge* of any individual . . . " 542 F.2d at 221.

In *de Loraine* v. *MEBA Pension Trust,* 499 F.2d 49 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974), the Second Circuit held that section 4(f)(2) permitted the involuntary termination of an individual prior to age 65 pursuant to a pension trust. The Court declared that since the trust was established long before ADEA was enacted and "*pays substantial benefits to a broad class of workers* . . . , the Trust is certainly not itself a subterfuge to evade the purposes of the statute." 499 F.2d at 50. (emphasis added).

It is true, as noted by the Fourth Circuit, 542 F.2d at 220 n.5, that the Second Circuit in *de Loraine* stated that it was declining to consider an argument made by an *amicus curiae* that the ADEA prohibits all involuntary retirement pursuant to a pension plan before age 65.[4] However, resolution of that issue favorably to the trust in *de Loraine* seems clearly to have been part of the court's conclusion that section 4(f)(2) authorized the employee's termination at age 52. Certainly, the Second and Fourth Circuits are in direct conflict on the question of whether an early retirement plan adopted before enactment of ADEA and providing substantial benefits can be a subterfuge to evade the *purposes* of the Act.[5]

The decision of the Fourth Circuit in *McMann* also conflicts with the action of the Ninth Circuit in affirming a lower court decision which had ruled that section

[4] The Second Circuit pointed out that "plaintiff did not take this position in the district court." 499 F.2d at 51 n.7.

[5] *Compare* 499 F.2d at 50-51 *with* 542 F.2d at 219-21.



4(f)(2) authorized involuntary termination at age 56 pursuant to a mandatory retirement plan adopted before the enactment of ADEA. *Steiner* v. *National League of Professional Baseball Clubs,* 377 F. Supp. 945 (C.D. Cal. 1974), *aff'd,* No. 74-2604 (9th Cir. Oct. 15, 1975). While the Ninth Circuit did not issue an opinion with its affirmance,[6] in a recent Title VII case, that court observed that in section 4(f)(2), "Congress did expressly exempt actuarially based pension and retirement funds from the provisions of the [ADEA]".[7]

## II. THE DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT[8]

The Fourth Circuit held that in order for involuntary retirement prior to age 65 to be considered authorized by section 4(f)(2), "*the employer* must demonstrate that . . . [its] plan is not being *maintained* as a subterfuge to evade the Act . . . " 542 F.2d at 221 (first

[6] A copy of the Order of Affirmance is in the Appendix at 1a. Rule 21(c) of the Ninth Circuit provides that such "disposition . . . shall not be cited to or by this court for any district court of the Ninth Circuit," with certain exceptions not here relevant.

[7] Manhart v. Los Angeles, Nos. 75-2729, 75-2807 and 75-2905, 13 FEP Cases 1625, 1632 (9th Cir. Nov. 23, 1976).

[8] The *amicus* also adopts petitioner's contention that the Fourth Circuit's decision, *see* 542 F.2d at 219-20 n. 4 and 222 n. 6, conflicts with applicable decisions of this Court in rejecting contemporaneous administratve interpretations and opinions (see note 3, *supra*), in favor of the advocative position advanced for the Secretary of Labor in an *amicus* brief. *See, e.g.,* General Electric Co. v. Gilbert, Nos. 74-1589 and 74-1590, 45 U.S.L.W. 4031, 4036 (U. S. Dec. 7, 1976); United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858-59 n. 25 (1975). The *amicus* also notes that the Secretary's "revised" position, filed with the Fourth Circuit on February 4, 1976, has not yet been reflected in any change in the published regulations.

emphasis added.) Under this construction, to qualify for the protection of the statutory exemption, the employer must prove the negative element of the exemption (the non-existence of a subterfuge) as well as prove the positive element (the "bona fides" of its retirement plan.)

Such an approach clearly conflicts with decisions of this court allocating the burden of proof in comparable situations under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e (1970).

For example, in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), the Court described the order of proof where an employer sought to utilize the exemption in section 703(h) to defend its use of a personnel test which had a discriminatory effect on minority applicants. That exemption applies to actions based upon the results of a professionally developed ability test, provided that such test or action based thereon "is not designed, intended or used to discriminate because of race . . ." 42 U.S.C. § 2000e-2(h) (1970). In the court's view, employers have the burden of establishing through professional validation studies whether their employment tests are job-related. 422 U.S. at 430-31. However, if an employer meets this burden, "it remains to the complaining party to show that other tests . . . without a similarly undesirable racial effect would also serve the employer's legitimate interest . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.* at 425.

*McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), also placed the burden on the complaining party to show that the employer's justification for a challenged practice was a pretext for discrimination and that case was cited as authority for the above quoted statements in *Albemarle Paper.*



The court's recent opinion in *General Electric Co.,* v. *Gilbert,* Nos. 74-1589 and 74-1590, 45 U.S.L.W. 4031, 4034 (U.S. Dec. 7, 1976) makes clear that in employment discrimination cases, the words "pretext" and "subterfuge" are considered to be synonymous.

### III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT [9]

The Secretary of Labor in his *amicus* brief to the Fourth Circuit acknowledged that this case is "one of basic importance to the administration and enforcement of Act".[10] In his 1975 annual report to Congress pursuant to section 13 of the Act, the Secretary noted the holding in *Brennan* v. *Taft Broadcasting Co.,* 500 F.2d 212 (5th Cir. 1974), and stated that the Department of Labor would seek "to develop a conflict with this opinion in another circuit." [11] The decision below is the fruition of the Secretary's efforts.

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[9] In Massachusetts Board of Retirement v. Murgia, No. 74-1044, 96 S.Ct. 2562 (June 25, 1976), this Court upheld the action of a State in mandatorily retiring its uniformed police at age 50, but the ADEA was not raised in that case.

[10] Brief for the Secretary of Labor as *Amicus Curiae* at 4, McMann v. United Air Lines, Inc., No. 75-2206 (4th Cir. filed Feb. 4, 1976.)

[11] U. S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, *Age Discrimination in Employment Act of 1967,* at 17 (Jan. 31, 1975) (A report covering activities under the Act during 1974 submitted to Congress in 1975 in accordance with section 13 of the Act).

The Fourth Circuit's conclusion that "there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages", 542 F.2d at 220, effectively precludes mandatory retirement of employees prior to age 65 in most cases. Few employers would be able to *prove* that some "economic or business purpose" required retirement at a particular age. *See id.* at 221. Moreover, the reasoning of the court also makes suspect the numerous other provisions of employee benefit plans which frequently differentiate on the basis of age, such as vesting provisions, benefit payment formula, funding provisions and premium payments for insurance and health plans.

It has been authoritatively recognized that mandatory retirement provisions in pension plans provide employers flexibility in personnel management to meet special conditions in particular industries,[12] and also to attract and advance younger employees.[13]

Congress also has recognized the importance to employers of the option of mandatory retirement by consistently refraining from infringing on the availability

[12] REPORT OF THE PRESIDENT'S COMMISSION ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS ix, 24 (Jan. 1965). In 1971, 58% of all workers were covered by pension plans which contained mandatory retirement provisions. H.E. Davis, *Pension Provisions Affecting The Employment of Older Workers*, 69 MONTHLY LABOR REV. 41, 42 (April 1973).

[13] H.R. Rep. No. 93-98, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 1396, 1398-1401; see TAGGART, THE LABOR MARKET IMPACTS OF THE PRIVATE RETIREMENT SYSTEM 8 (Feb. 21, 1973) (A Dissertation prepared for Manpower Administration, distributed by National Technical Information Service, U.S. Department of Commerce).



of this management prerogative. In 1964, Congress declined to include "age" as a Title VII protected category because "it is absolutely impossible to predict what impact this [provision] would have" on industrial group insurance and pension plans.[14] In 1967, in enacting the ADEA, Congress included section 4(f)(2) to expressly exempt not only mandatory retirement provisions, as the Administration bill had done,[15] but all age-related provisions in employee benefit plans.[16] Fur-

[14] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND IX OF CIVIL RIGHTS ACT OF 1964, at 3174 (1968).

[15] The Administration bill contained the following exemption:

> It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. . . .

S. 830, 90th Cong., 1st Sess. § 4(f)(2)(1967).

Secretary Wirtz testified at the Senate Hearings on the effect of this exemption:

> [T]he effect of the provision in section 4(f)(2) which appears on page 6 *is to protect the application of almost all plans which I know anything about.*
>
> • • •
>
> *It is intended to protect retirement plans.*

*Hearings on S. 830 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 53 (1967) (emphasis added).

[16] Senator Javits introduced an amendment that led to the additional language presently in section 4(f)(2) with the following remarks:

> *The Administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem.*
>
> • • •
>
> I have prepared and will introduce today a series of amendments to the Administration's bill, which I believe will meet these various problems, *while retaining the most desirable*

ther, Congress also included section 5 in the ADEA, requiring the Secretary to study "institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations . . . ," 29 U.S.C. § 624 (1970), a meaningless requirement if involuntary retirement had been prohibited by the immediately preceding section of the Act.

Finally, it should be noted that the recently enacted Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 88 Stat. 829 (1974), requires employee benefit plans to conform with many age-related standards.[17] The ruling of the Fourth Circuit thus creates serious confusion for those planning and administering employee benefit programs when they attempt to square their responsibilities under ERISA with the Fourth Circuit's view of the ADEA.

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*features of the Administration's bill,* and of S. 788. Let me briefly describe them:

• • •

Third, that *a fairly broad exemption* has been provided for bona fide retirement and seniority systems. As I previously noted, *S. 830 contains only a limited exemption for retirement systems* and no exemption for seniority systems.

113 Cong. Rec. 7076 (1967) (emphasis added).

[17] *E.g.*, vesting may be dependent in part on an employee's age, ERISA § 203(a)(2)(C)(i), 29 U.S.C. § 1053(a)(2)(C)(i) (Supp. IV 1974); "normal" retirement age may be before age 65, ERISA § 3(24), 29 U.S.C. § 1002(24) (Supp. IV 1974); benefit payments may begin on the earlier of the 65th birthday or normal retirement, ERISA § 206(a)(1), 29 U.S.C. § 1056(a)(1) (Supp. IV 1974); age 55 is the base age for determining maximum allowable annual benefits, ERISA § 2004(a)(2)(C), 26 U.S.C. § 415(b)(2)(C) (Supp. IV 1974).



## CONCLUSION

A writ of certiorari should be granted at this time because the decision below has a final and irreparable effect on the rights of the parties. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545 (1949). The issue presented is fundamental to the further conduct of the case. *United States* v. *General Motors Corp.* 323 U.S. 373, 377 (1944). If the case goes forward to trial in its present posture, the employer will be required to carry a burden of proof in conflict with applicable decisions of this Court. The cost and inconvenience of trying the case with these questions unanswered will be much greater than any inconvenience of review at this time. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964). Also, if the decision below is not quickly reviewed, employers with employees in each of the circuits in conflict will be unsure of the validity of pension plan provisions covering all such employees.

For the reasons stated herein, the Chamber of Commerce of the United States of America urges that this Court grant the petition for certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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# APPENDIX



## APPENDIX

**United States Court of Appeals for the Ninth Circuit**

| | |
|---|---|
| MELVIN STEINER, *Plaintiff-Appellant,* vs. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, CHARLES FEENEY, as President of the National League of Baseball Clubs, *Defendants-Appellees.* | No. 74-2604 **Order** |

[October 15, 1975]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and SNEED, Circuit Judges, and RENFREW,* District Judge

The judgment is affirmed for the reasons stated by the district court. *See* 377 F. Supp. 945 (C.D. Cal. 1974).

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* Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

**APPENDIX**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-906**

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 30, 1976
CERTIORARI GRANTED FEBRUARY 22, 1977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-906.**

---

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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## CONTENTS OF APPENDIX

# APPENDIX.

## DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1/31/75 | Complaint—filed. |
| 2/ 3/75 | Summons (Original and one) with copy of complaint issued and given to Marshall for service. |
| 2/13/75 | Marshal's return on summons executed—filed. |
| 3/ 7/75 | Answer—filed by Deft. United Air Lines, Inc. |
| 3/26/75 | Order extending the deft. United Air Lines, Inc.'s time to answer by ten days entered—filed. Copies sent. (AVB) |
| 3/31/75 | Pretrial Order (AVB) entered and filed, cutoff for all discovery is July 11, 1975, formal pretrial set for July 15, 1975 at 10:40 A.M. Copies sent. |
| 7/15/75 | Formal Pretrial: (AVB) Appearances of counsel. Case set for trial by the court 8/27/75. |
| 7/15/75 | Defendant's list of witnesses—filed. |
| 7/15/75 | Pltf's list of witnesses—filed. |
| 7/15/75 | Stipulation of facts—filed. |
| 7/24/75 | Motion for summary judgment filed by the deft's. |
| 7/24/75 | Memorandum of law in support of deft's. motion for summary judgment filed. |
| 7/24/75 | Notice returnable for August 1, 1975 for hearing on deft's. motion for summary judgment filed. |
| 7/28/75 | Motion for Summary Judgment filed by Plaintiff. |
| 7/28/75 | Memorandum of Law in support of Plaintiff's motion for summary judgment filed. |

| | |
|---|---|
| 7/28/75 | Notice returnable Aug. 1, 1975 on Plaintiff's motion for summary judgment. |
| 7/29/75 | Deft's. response to pltf's motion for summary judgment—filed. |
| 8/ 1/75 | Trial Proceedings: J. Bryan. This matter came on for hearing on cross motions for summary judgment. Appearances of counsel. Motions argued and granted as to defts. motion. |
| 9/ 2/75 | Order granting summary judgment to deft. and dismissing cause entered and filed. Copies sent. (AVB) |
| 9/29/75 | Notice of appeal—filed by the pltf. |
| 11/11/75 | Record on appeal in one volume, Vol. I, filed and appeal docketed. bjm |
| 11/11/75 | Transcript of proceedings in one volume, Vol. II, filed. bjm |
| 11/11/75 | Briefing schedule established. bmj |
| 11/18/75 | Appearance for the appellant filed and entered. (fls) |
| 11/18/75 | Appearance for the appellee filed and entered. (fls) |
| 11/21/75 | Appearance for the appellee filed and entered. (fls) |
| 12/18/75 | Motion for enlargement of time for filing of appellant's brief and appendix to January 21, 1976 filed. Motion granted. jab |
| 12/29/75 | Appearance for the appellee filed and entered. (fls) |
| 1/21/76 | Ten (10) copies of the joint appendix filed. (whf) |
| 1/21/76 | Order allowing Secretary of Labor for leave to file brief as Amicus Curiae and extending time to file said brief to 1/30/76. (fls) |



| | |
|---|---|
| 1/21/76 | Twenty-five (25) copies of the appellant's brief filed. (whf) |
| 2/ 2/76 | Motion of the amicus curiae for an extension of time to file brief to February 3, 1976, filed. Motion granted. (fls) |
| 2/ 4/76 | Twenty-five (25) copies of the amicus brief filed. (Sec. of Labor) (WTC) |
| 3/ 1/76 | Twenty-five (25) copies of the appellee's brief filed. (whf) |
| 3/22/76 | Motion of the Secretary of Labor for leave to present oral argument as amicus curiae filed. epb —Send to panel when set for oral argument. CRL |
| 3/26/76 | Appearance for the amicus curiae filed and entered. (fls) |
| 5/20/76 | Motion for amicus curiae for leave to present oral argument, filed 3/22/76, transmitted to CFH, HLW, JBC. epb |
| 6/10/76 | Cause argued before Haynsworth, Chief Judge, Winter & Craven, Circuit Judges and and submitted. (rwr) |
| 8/18/76 | Letter with attachments from Joseph A. Rafferty, Jr., transmitted to CFH, HLW, JBC. epb |
| 10/ 1/76 | Opinion filed. (HLW) (cfw) |
| 10/ 1/76 | Opinion mailed to counsel of record and the Clerk of the Alexandria, Va. district court. (cfw) |
| 10/ 1/76 | Judgment of the district court reversed and remanded. Judgment filed. (cfw) |
| 10/13/76 | Appellant's verified bill of costs received. (jhl) |
| 10/22/76 | Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Alexandria, Va. |

10/22/76 Record on appeal in one volume and transcript in one volume returned to the Clerk of the District Court at Alexandria, Va. (jhl)

1/10/77 Notice evidencing the filing petition for writ of certiorari in the Supreme Court December 30, 1976 filed. (No. 76-906) (jhl)

3/ 3/77 Certified copy of order of the Supreme Court granting certiorari February 22, 1977 filed. (jhl)

3/ 7/77 Record on appeal in one volume and transcript in one volume received from the Clerk of the District Court at Alexandria, Va.

3/ 7/77 Certified record in three volumes transmitted to the Clerk of the Supreme Court. (jhl)



IN THE UNITED STATES DISTRICT COURT
for the Eastern District of Virginia
(Alexandria Division)

HARRIS S. McMANN, *Plaintiff,*
*vs.*
UNITED AIR LINES, INC., *Defendant.*

Civil Action No. 72-75-A

## COMPLAINT

Plaintiff, by his attorney, Francis G. McBride, complaining of defendant, alleges as follows:

*Jurisdiction and Venue*

1. This complaint is filed and these proceedings are instituted under the Age Discrimination in Employment Act (29 U. S. C. §§ 621 et seq.), and 29 U. S. C. §§ 211(b); 216 (except subsection (a)); 217; and 626, for its violations of the Age Discrimination in Employment Act.

2. The defendant herein named transacts business in the Eastern District of Virginia. The acts herein complained of occurred in whole or in part within the Eastern District of Virginia.

*Description of Parties*

3. Plaintiff Harris S. McMann was born January 23, 1913, and is now 62 years of age. He was employed by defendant from April 14, 1944 until January 31, 1973, in various capacities, and, most recently, as a "Technical Specialist—Aircraft Systems". Effective February 1, 1973, defendant retired the plaintiff involuntarily, and solely upon the grounds that the plaintiff had passed his 60th birthday.

4. Defendant United Air Lines, Inc., is a Delaware corporation engaged in the business of commercial air transportation on a regularly scheduled basis.

*Violations*

5. Such involuntary retirement of the plaintiff at his 60th birthday constituted an act of discrimination based solely upon age, and as such was unlawful under the Age Discrimination in Employment Act (81 Stat. 602 (1967)), specifically § 4(a).

*Notice*

6. Notice of intent to file this suit was sent to the Secretary of Labor more than 60 days prior to the commencement of this suit, as required by § 7(d) of the Act.

WHEREFORE, the plaintiff prays that this Court:

1. Adjudge and decree that the acts of defendant as hereinbefore described are and continue to be in violation of § 4(a) of the Age Discrimination Act.

2. Issue a permanent injunction against defendant, enjoining the continued unlawful practices herein alleged.

3. Declare the retirement of plaintiff to be an unlawful act of age discrimination, and to order that the plaintiff be reinstated to his position as "Technical Specialist—Aircraft Systems", or alternatively, as a Second Officer.

4. Issue a permanent injunction restraining the defendant from retiring or dismissing the plaintiff after reinstatement until his 65th birthday.

5. Award as damages and as back pay the salary of the plaintiff during the period of his involuntary retirement, as provided in the Act.



6. Grant such other and further and different relief as the Court shall deem just.

FRANCIS G. MCBRIDE
*Attorney for Plaintiff*

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7900 Westpark Drive
McLean, Virginia 22101
(703) 893-0602

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Virginia
Alexandria Division

HARRIS S. McMANN,
10711 Howerton Avenue,
Fairfax, Virginia 22030,
*Plaintiff,*

*vs.*

UNITED AIR LINES, INC.,
P. O. Box 66100,
Chicago, Illinois 60666,
*Defendant.*

Civil Action
No. 72-75-A

## ANSWER

Now comes the defendant, United Air Lines, Inc., and for answer to the Complaint states as follows:

1. Defendant admits that plaintiff purports to bring this action under the Age Discrimination in Employment Act, 29 U. S. C., Section 621 et seq. and 21 U. S. C., Section 211(b), 216 (except subdivision a), 217 and 626, but denies that defendant has violated the Act or these provisions and denies that the jurisdictional prerequisites of the Act have been met.

2. Defendant admits that it transacts business in the Eastern District of Virginia but denies the remaining allegations of paragraph 2 of the Complaint.

3. Defendant admits the allegations of paragraph 3 of the Complaint except that defendant denies that it retired the plaintiff "solely" upon the ground that the plaintiff had passed his 60th birthday. Answering further, defendant avers it involuntarily retired the plaintiff in accordance with the terms of a bonafide benefit plan under which plaintiff was a member.



4. Defendant admits the allegations of paragraph 4 of the Complaint.

5. Defendant denies the allegations of paragraph 5 of the Complaint.

6. Defendant admits the allegations of paragraph 6 of the Complaint.

### FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

### SECOND AFFIRMATIVE DEFENSE

The Complaint is insufficient in law in that it fails to allege or demonstrate that plaintiff has complied with all jurisdictional requirements set forth in 29 U. S. C., Section 626(d).

### THIRD AFFIRMATIVE DEFENSE

The Complaint was not filed within two years after the alleged act of discrimination and is barred by the two year statute of limitation specified in 29 U. S. C., Section 626(e).

### FOURTH AFFIRMATIVE DEFENSE

Plaintiff was retired at age 60 in accordance with the terms of a bonafide Employee Benefit Plan within the meaning of Section 4(f)(2) of the Act and Section 860.110 of the Secretary of Labor's interpretation of the Act.

WHEREFORE, defendant prays that plaintiff take nothing from his Complaint and that the said Complaint be dismissed with costs.

Respectfully submitted.

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IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Virginia
Alexandria Division

HARRIS S. McMANN, *Plaintiff,*
*vs.*
UNITED AIR LINES, INC., *Defendant.*
Civil Action No. 72-75-A

## STIPULATION OF FACTS

The parties hereby stipulate to the following facts:

1. Defendant is and at all times material hereto has been an Employer within the meaning of the Age Discrimination in Employment Act of 1967.

2. Plaintiff was born on January 23, 1913.

3. Plaintiff was hired by Defendant on April 14, 1944 and served Defendant in various capacities, most recently as a "Technical-Specialist—Aircraft Systems."

4. At the time Plaintiff was hired by Defendant on April 14, 1944, Defendant had in existence a formal retirement income plan (hereinafter referred to as the "Plan") which provided for benefits to employees who joined the Plan. These benefits were arranged through a group annuity contract issued jointly by Connecticut General and John Hancock Mutual Life Insurance Companies.

5. Participation in the Plan by employees was purely voluntary.

6. From time to time during his employment, prior to 1964, Plaintiff was given opportunity to join the Plan, but elected not to do so. On December 18, 1950, Plaintiff signed a card acknowledging that he was offered opportunity to join the Plan and declined.

7. On January 23, 1964 Plaintiff elected for the first time to participate in the Plan as applicable to non-union flight employees and signed an application card applying to join the Plan effective as of February 1, 1964. The application card signed by Plaintiff shows on its face that the normal retirement age for employees in his classification was age 60. A true copy of the card signed by Plaintiff is attached as Stipulation Exhibit No. 1.

8. In 1965, employees in Plaintiff's job classification were transferred from that part of the Plan applicable to non-union flight employees to that part of the Plan applicable to union flight employees. No change was made in the normal retirement age of 60 as applicable to Plaintiff.

9. Plaintiff was retired on the first day of the month following the date of his 60th birthday; i.e., he was retired on February 1, 1973.

10. On an annual basis from the time he joined the Plan in 1964 until he retired in 1973, Plaintiff received a statement showing his estimated benefits under the Plan at the time of his retirement. In each statement sent to him in each year from 1964 until 1973, reference was made—and his estimated earnings were calculated—on a retirement age of 60. A copy of the statement sent to him in 1964 is attached as Stipulation Exhibit No. 2.

11. From time to time Defendant sends to its employees information booklets describing the salient features of the Plan as applicable to them. Plaintiff was among those sent copies of the booklets describing the Plan. In each case, the booklet sent Plaintiff described the normal retirement age as age 60.

12. Plaintiff has collected benefits under the Plan since his retirement on February 1, 1973. These benefits varied in amount depending on the value of the units in the Plan.

13. In March, 1973, Plaintiff was given supplemental payments by Defendant in accordance with the letter to him attached as Stipulation Exhibit No. 3.



14. Plaintiff filed a grievance with the Defendants claiming his involuntary retirement violated provisions of the Pilots' collective bargaining agreement. His grievance was denied in arbitration. A copy of the award is attached as Stipulation Exhibit No. 4.

15. Plaintiff filed notice of intent to sue Defendant with the Secretary of Labor pursuant to the Age Discrimination in Employment Act of 1967. Following conferences between representatives of the Department of Labor and attorneys for Plaintiff and Defendant, the Department's regional attorney wrote Plaintiff and Defendant and advised the parties that the retirement income plan of Defendant "is a bona fide employee plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act." A copy of the letter received by Defendant is attached as Stipulation Exhibit No. 5.

16. Plaintiff filed his notice of intent to sue Defendant more than 60 days prior to the commencement of his lawsuit.

For Plaintiff
/s/ FRANCIS G. MCBRIDE
*Attorney*

For Defendant
/s/ EARL G. DOLAN
*Attorney*

Dated July 15, 1975

| | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| H | S | McMANN | | 701234 | DC 1 | 5170 | 2940 | P | 8 | 1 | 13 | 4 | 19 | 44 | | | | | |
| FIRST NAME | INITIAL | LAST NAME | SEX | FILE NO. | LOCATION | ORGANIZATION | JOB OCCUPATION CODE | G.P. | P/S | MO. | DAY | YR. | MO. | DAY | YR. | MO. | YR. | | |
| | | | | | | | | | | BIRTH DATE | | | CO SEN DATE | | | ELIG. DATE | | | |

## UNITED AIR LINES

### RETIREMENT INCOME PLAN APPLICATION CARD

I hereby apply for participation in the UAL Retirement Income Plan for which I am or may become eligible as such Plan may from time to time exist or be amended. I designate the beneficiary(ies) shown hereon as my beneficiary (ies) for all coverage under said Plan, and authorize United Air Lines, Inc. to deduct from my earnings such amount as may be payable by me from time to time under the provisions of such plan.

BENEFICIARY(IES) AND RELATIONSHIP

| FIRST NAME | INITIAL | LAST NAME | RELATIONSHIP |
|---|---|---|---|
| Ernestine | H. | McMann | Wife |

EMPLOYEES SIGNATURE Harold S. McMann

DATE SIGNED Jan. 23, 1964

| FOR EXOIN USE ONLY | ENTRY DATE | INS. BIRTH YEAR | NRA | NRD |
|---|---|---|---|---|
| 22 B | 2-1-64 | 1913 | 60 | 2-1-73 |



STIPULATION EXHIBIT NO. 1.

STIPULATION EXHIBIT NO. 2.

OFFICE COPY

# UNITED AIR LINES

## RETIREMENT INCOME PLAN

1964

EMPLOYEE'S ANNUAL STATEMENT, DECEMBER 31, 1964

| NAME | COMPANY ADDRESS | DEPARTMENT NUMBER | SOCIAL SECURITY NUMBER | PLAN CODE | BENEFICIARY | |
|---|---|---|---|---|---|---|
| H S MC MANN | DCAFO | 8170 | 1234 | 33 | ERNESTINE H | W |

### FIXED BENEFIT PART

1 YOUR CONTRIBUTIONS TO DATE $ 632.08

2 YOUR CONTRIBUTIONS TO DATE WITH INTEREST 632.08

3 YOUR ANNUAL RETIREMENT INCOME FOR PARTICIPATION TO DATE, STARTING AT NORMAL RETIREMENT AGE 60 237.03

4 YOUR ESTIMATED ANNUAL RETIREMENT INCOME FOR PARTICIPATION FROM THE DATE OF THIS STATEMENT TO YOUR NORMAL RETIREMENT DATE

| | | |
|---|---|---|
| 0 | x | |

5 ASSUMING NO OPTIONAL FORM OF ANNUITY ELECTED, YOUR ESTIMATED TOTAL ANNUAL RETIREMENT INCOME AT NORMAL RETIREMENT DATE FROM THE FIXED BENEFIT PART (ITEMS 3 + 4)

### VARIABLE BENEFIT PART

6 YOUR CONTRIBUTIONS TO DATE $ 790.11

7 CURRENT VALUE OF YOUR CONTRIBUTIONS TO DATE 790.11

8 YOUR ANNUAL RETIREMENT INCOME FOR PARTICIPATION TO DATE, STARTING AT NORMAL RETIREMENT AGE 60

A YOUR TOTAL BENEFIT UNITS TO DATE 6.106

B CURRENT VALUE OF EACH BENEFIT UNIT $ 25.018

A TIMES B 152.76

9 YOUR ESTIMATED ANNUAL RETIREMENT INCOME FOR PARTICIPATION FROM THE DATE OF THIS STATEMENT TO YOUR NORMAL RETIREMENT DATE

| | | | | |
|---|---|---|---|---|
| 0 | x | | x | $ 25.018 |

10 ASSUMING NO OPTIONAL FORM OF ANNUITY ELECTED, YOUR ESTIMATED TOTAL ANNUAL RETIREMENT INCOME AT NORMAL RETIREMENT DATE, FROM THE VARIABLE BENEFIT PART (ITEMS 8 + 9)

ADDING THE AMOUNTS OF ITEMS 5 AND 10, AND INCLUDING YOUR ESTIMATED SOCIAL SECURITY BENEFITS PAYABLE AT AGE 65 * YOUR TOTAL ANNUAL RETIREMENT INCOME FROM THESE SOURCES AFTER AGE 65 WILL BE $

1 The letter following a name in this space indicates the relationship of your beneficiary

W wife — M mother — S son or son — B brother — U uncle — N nephew or niece
H husband — F father — D daughter — I other — G grandmother

If no name appears in this space, your beneficiary designation is too long to be reproduced here. Shown instead is the date of your last beneficiary change. As your circumstances change, you may name a new beneficiary on forms obtainable from your supervisor or EDDIE

2 If you have been a member of the Plan for less than a year, your estimated retirement income will appear on your next statement

3 Social Security benefits normally become payable at age 65. At present rates your maximum benefits are $1,524 annually

4 To determine your contributions to the Plan combine items 1 and 6

STIPULATION EXHIBIT NO. 3

March 15, 1973

Mr. H. S. McMann
10711 Howerton Avenue
Fairfax, Virginia 22030
Dear Mr. McMann:

When your pension plan payments started at your normal retirement date, February 1, 1973, they were less than what you may have been expecting to receive based upon the minimum benefit provisions of the plan in effect prior to June 1, 1972. As a result, United has decided that supplemental retirement income should be provided to you by direct payments from the Company.

The initial amount of the monthly payments will be $420.00 which recognizes the approximate difference between what you would have received monthly under the old minimum benefit provisions had you retired without a retirement option and the monthly payments that you in fact received also calculated without reference to a retirement option. Payments to you in this monthly amount will continue until January 1, 1974 at which point the monthly amount will be reduced by $5.00. On each July 1 and January 1 thereafter, the amount will be further reduced by an additional $5.00 until the amount of the monthly payment to you is less than $25.00 at which time further payments will be discontinued. This scheduled periodic reduction anticipates the possible long term improvements in the variable pension benefit payments you are receiving. Calculation of the amount of the direct monthly payment to you without regard to the 10-year certain option you elected under the pension plan produces a higher direct monthly payment than if such option had been considered in making the calculation. The reason for not considering the option is that these direct payments would not be continued after your death.

You will soon receive a check in the amount of $840.00 representing the two monthly payments for February and March and your monthly check for April should be received about the first of that month.

We are attaching our letter to Captain Arsenault which more specifically details the Company decision.

If you have any questions concerning this supplemental retirement income payment, please contact Jerry Howland, EXOIN.

Very truly yours,

/s/ CLARK E. LUTHER
Clark E. Luther
*Vice President*
*System Personnel*

Att.
cc: W. E. Arsenault
G. P. Howland



## STIPULATION EXHIBIT NO. 4

UNITED AIR LINES PILOTS SYSTEM BOARD OF ADJUSTMENT

No. 73-10

In the matter of

HARRIS S. McMANN

AWARD

This case arises out of a grievance filed by Harris S. McMann complaining of his forced retirement following his 60th birthday. On April 23, 1973 Airline Pilots Association submitted the dispute to the System Board of Adjustment on behalf of the grievant, with a request that a fifth and neutral member sit with the Board at the initial hearing.

The hearing was held at the Executive Offices of United on October 13, 1972. Mr. McMann was separately represented by Francis G. McBride, Esq., who pressed the grievance in his behalf. ALPA, appearing by its attorney Charles W. Goldstein, Esq., presented views on some points of jurisdiction but took no position on the merits. Earl G. Dolan, Esq. appeared for United Air Lines.

United filed a motion to dismiss upon which the System Board reserved ruling pending receipt of evidence on the merits. Both parties were afforded a full opportunity to present evidence and argument thereon. Thereafter the System Board met in executive session and upon full consideration of the submission, the motion to dismiss or limit the issues, the evidence, argument and entire record in this proceeding it hereby awards:

1. The grievant has failed to make out either a violation or an erroneous interpretation or application of the Pilots Agreement or any other meritorious grievance within the jurisdiction of the System Board of Adjustment.

2. The grievance is dismissed without prejudice to any rights or remedies independent of the Pilots Agreement,

which may be available to the grievant under Executive Order No. 11141, 29 Fed. Reg. (February 15, 1964) 2477 or the Age Discrimination Act of 1967.

September 13, 1974

/s/ ARCHIBALD COX
/s/ ROBERT S. CRUMP
/s/ EDWARD J. KELLY
/s/ RUSSELL J. MILLER
/s/ STUART BERNSTEIN



## OPINION OF THE NEUTRAL MEMBER

### I.

United moved to dismiss this case upon the ground that Mr. McMann's letter of grievance complained of his removal from the position "Technical Specialist—Aircraft Systems" and requested his reinstatement to that position; the position—United argues—is a managerial post outside the scope of the Pilots Agreement and therefore the System Board has no jurisdiction to grant the only relief requested.

Counsel for the grievant virtually conceded that the System Board has no power to protect a "Technical Specialist—Aircraft Systems" provided that neither his right to return to the position of Second Officer nor any of his rights as a Second Officer are affected (Tr. 43-5). ALPA counsel did not dispute the point although he was unwilling to take a position (Tr. 49-52). Counsel for the grievant replied to United's argument by saying that the forced retirement of Mr. McMann is subject to challenge because it did cut off his right to return to the position of Second Officer under the Pilots Agreement and did terminate his seniority and accompanying rights under the Agreement.

United seemed to agree, through its attorney, that if Mr. McMann had so stated his claim, it would not be vulnerable to the objection now under consideration (Tr. 63-5). But—counsel agrees—the grievance made no such claim and the present, additional formulation comes too late.

The letter of grievance does not limit itself to complaint of the loss of a right to resume status as a pilot and the accompanying rights under the Pilots Agreement; indeed it does not specifically mention such status and rights. On the other hand, anyone reading the letter with a little imagination would realize that Mr. McMann was complaining of every aspect of his forced retirement and seeking to assert any and every right that he might have. Again, although only reinstatement to "Technical

Systems—Aircraft Specialist" is requested, it is hard to believe that Mr. McMann meant to abjure lesser remedies.

So generous a reading might be inappropriate if United were prejudiced or the purposes of the grievance procedure were defeated by allowing Mr. McMann to go forward. But United is nowise prejudiced, and the development of the case was affected in no substantial respect.* There is not the slightest possibility that a better-phrased grievance would have been adjusted. No research of any character was omitted. No issues have been interjected that might benefit from further deliberation between the parties or by either side.

The objection raised in paragraphs I and 5 of the Motion to Dismiss is therefore over-ruled.

## II.

Paragraph 6 of the Motion to Dismiss asserts that the System Board has no jurisdiction because "no provision of the Collective Bargaining Agreement between United and its pilots concerning retirement age is alleged to have been breached."

There is indeed little claim and not even a colorable showing that the United violated any contractual obligation. None is claimed except for the argument that because good health and fitness for duty call for retaining a participant beyond the age of 60 "normal" means "average" in Section 5 of the Pilot Variable Retirement Plan, which provides—

* At the initial and appeals levels of the grievance procedure, United denied Mr. McMann a hearing because it read the grievance as limited to Mr. McMann's claim to resume his management position. This was not an unreasonable interpretation and, prior to the Submission, Mr. McMann did nothing to clarify the point. The Submission, which does refer to Mr. McMann's status as a pilot, requests, as one possible form of relief, that the matter be remanded for a hearing. A remand would serve no useful purpose. United's position here makes it plain that the grievance would be denied. We decide the case, therefore, as if all prior procedural steps had been fully satisfied.



> "The normal retirement age shall be the 60th birthday of a Participant, Inactive Participant or Terminated Participant."

The argument is unpersuasive. "Normal" means regular or standard, not average, not only as a matter of linguistics but also in the general context of retirement and pension plans and the settled practice at United.*

The primary response of both the grievant and ALPA to paragraph 6 of the United's motion is that the System Board's jurisdiction is not confined to "disputes growing out of . . . interpretation or application of any of the terms" of the Pilot's Agreement but extends also to "disputes growing out of grievances" (see Section 18-C1).

We have no need to face the issue in such broad terms nor to offer a general definition of grievances. Nor is it necessary to say that the System Board can—or cannot—consider questions of law. The only question is whether the System Board can consider the kind of claim that the grievant presents. His claim has a number of unusual characteristics:

1. The action of which the grievant complains does not violate any obligation, express or implied, under the Pilot's Agreement.

2. The action of which the grievant complains was taken in accordance with an established practice uniformly applied to all members of the bargaining unit. It is obvious, therefore, that the grievant has no case except as an attack upon the unit-wide practice.

3. Fixing the retirement age under an annuity plan is a very fundamental aspect of employment policy and/or collective bargaining, not a matter arising in the day-to-day operation of a business or in the day-to-day work of its employees.

4. The practice was widely known and firmly established at the time the Pilots Agreement was negotiated. The United Pilots'

* The above observations do not imply that the System Board has jurisdiction over alleged violations of the Plan.

negotiators could have required United to bargain about proposed changes. They did bargain about other aspects of the plan. In this sense the negotiators on both sides accepted the practice as a fundamental rule of the industrial jurisprudence governing the bargaining unit.

5. Other peaceable remedies are available for violation of the statute and/or executive order cited by the grievant. Under the rulings of the Supreme Court in analogous cases, a System Board decision could not have finality with respect to these claims.

These five characteristics, taken together, are fatal to the grievant's case as presented here. Whatever the exact scope of Section 18-C1, it does not authorize relief in a situation where the System Board concludes that United's action not only does not violate any express or implied obligation under the Pilots Agreement but also is wholly consistent with fundamental expectations and practices set forth in writing and prevailing throughout the bargaining unit at the time the Agreement was signed. Nothing more need be, or is, decided now.

C.

Since the System Board is not authorized to grant relief based upon an executive order or statute under the circumstances of the present case, our decision is without prejudice to any administrative or judicial remedies for alleged violation thereof.

September 12, 1974

/s/ ARCHIBALD COX
Archibald Cox

AC:wm



## STIPULATION EXHIBIT NO. 5

U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Division
Federal Building, 400 N. Eighth Street
Richmond, Virginia

Date: January 18, 1973
Reply to
Attn of: Harris S. McMann
Subject: Age Discrimination Claim

To: Mr. Earl G. Dolan, Director
Personnel Legal Affairs
United Air Lines
P. O. Box 66100
Chicago, Illinois 60666

This is in further reference to the above styled matter insofar as the Age Discrimination in Employment Act of 1967 is concerned.

Following my conference with you in this office and my earlier conference with Mr. Francis G. McBride, Attorney for Mr. McMann, I referred the issue of your company's pending involuntary retirement of Mr. McMann, to be effective February 1, 1973, to our Regional Attorney at Nashville, Tennessee.

Regional Attorney Marvin Tincher has now advised that the retirement plan of your company is a bona fide employee benefit plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act. Further, he has held, that since the plan was adopted many years prior to the effective date of the indicated Act, it would not appear that the plan is a subterfuge to evade the purposes of the Act.

In view of the above, this office contemplates no further action with respect to this matter and has advised Mr. McBride to that

effect and that we are closing our file. Should you have any questions relative to the above, please feel free to write this office.

/s/ ROBERT F. FERGUSON, JR.
Robert F. Ferguson, Jr.
*Area Director*



IN THE UNITED STATES DISTRICT COURT,
For the Eastern District of Virginia,
Alexandria Division.

HARRIS S. McMANN,
*Plaintiff,*

*vs.*

UNITED AIR LINES, INC.,
*Defendant.*

Civil Action
No. 72-75-A

## ORDER GRANTING SUMMARY JUDGMENT.

This matter having come on for hearing before the Court on August 1, 1975, on cross-motions for summary judgment, the Court having read and considered the pleadings and having heard oral argument of counsel for the respective parties makes the following findings of fact as stipulated to by the parties:

## FINDINGS OF FACT.

1. Defendant is and at all times material hereto has been an Employer within the meaning of the Age Discrimination in Employment Act of 1967.

2. Plaintiff was born on January 23, 1913.

3. Plaintiff was hired by Defendant on April 14, 1944 and served Defendant in various capacities, most recently as a "Technical-Specialist—Aircraft Systems."

4. At the time Plaintiff was hired by Defendant on April 14, 1944, Defendant had in existence a formal retirement income plan (hereinafter referred to as the "Plan") which provided for benefits to employees who joined the Plan. These benefits were arranged through a group annuity contract issued

jointly by Connecticut General and John Hancock Mutual Life Insurance Companies.

5. Participation in the Plan by employees was purely voluntary.

6. From time to time during his employment, prior to 1964, Plaintiff was given opportunity to join the Plan, but elected not to do so. On December 18, 1950, Plaintiff signed a card acknowledging that he was offered opportunity to join the Plan and declined.

7. On January 23 ,1964, Plaintiff elected for the first time to participate in the Plan as applicable to non-union flight employees and signed an application card applying to join the Plan effective as of February 1, 1964. The application card signed by Plaintiff shows on its face that the normal retirement age for employees in his classification was age 60.

8. In 1965, employees in Plaintiff's job classification were transferred from that part of the Plan applicable to non-union flight employees to that part of the Plan applicable to union flight employees. No change was made in the normal retirement age of 60 as applicable to Plaintiff.

9. Plaintiff was retired on the first day of the month following the date of his 60th birthday; *i.e.*, he was retired on February 1, 1973.

10. On an annual basis from the time he joined the Plan in 1964 until he retired in 1973, Plaintiff received a statement showing his estimated benefits under the Plan at the time of his retirement. In each statement sent to him in each year from 1964 until 1973, reference was made—and his estimated earnings were calculated—on a retirement age of 60.

11. From time to time Defendant sends to its employees information blooklets describing the salient features of the Plan as applicable to them. Plaintiff was among those sent copies of the booklets describing the Plan. In each case, the booklet sent Plaintiff described the normal retirement age as age 60.



12. Plaintiff has collected benefits under the Plan since his retirement on February 1, 1973. These benefits varied in amount depending on the value of the units in the Plan.

13. In March, 1973, Plaintiff was given supplemental payments by Defendant.

14. Plaintiff filed a grievance with the Defendant claiming his involuntary retirement violated provision of the Pilots' collective bargaining agreement. His grievance was denied in arbitration.

15. Plaintiff filed notice of intent to sue Defendant with the Secretary of Labor pursuant to the Age Discrimination in Employment Act of 1967. Following conferences between representatives of the Department of Labor and attorneys for Plaintiff and Defendant, the Department's regional attorney wrote Plaintiff and Defendant and advised the parties that the retirement income plan of Defendant "is a bona fide employee plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act."

16. Plaintiff filed his notice of intent to sue Defendant more than 60 days prior to the commencement of his lawsuit.

17. That the plaintiff was covered by the Age Discrimination in Employment Act of 1967, 29 USC § 621 *et seq*. amended by P. L. 90-202 effective May 1, 1972.

18. Title 29 USC § 623(f)(2) expressly provides that it shall not be unlawful for any employer:

> ". . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

19. Plaintiff was retired in accordance with the terms of such a bona fide benefit plan within the meaning of Title 29 USC § 623(f)(2).

Accordingly, the Court concludes as follows:

## CONCLUSIONS OF LAW.

1. That there are no material issues of fact and defendant, United Air Lines, Inc., is entitled to judgment as a matter of law.

## ORDER.

It therefore this 2nd day of September, 1975.

ORDERED, That the plaintiff's motion for summary judgment be and the same hereby is denied and it is further,

ORDERED, That the defendant's motion for summary judgment be and the same is hereby granted and it is therefore,

ORDERED, That the Complaint herein be and the same hereby is finally dismissed.

ALBERT V. BRYAN, JR.,
*Judge.*

## CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, to Francis G. McBride, Esquire, Attorney for Plaintiff, Suite 911, 7900 Westpark Drive, McLean, Virginia 22101, this 13th day of August, 1975.

/s/ JOSEPH A. RAFFERTY, JR.
Joseph A. Rafferty, Jr.



UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

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No. 75-2206

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HARRIS S. MCMANN,
*Appellant,*

*vs.*

UNITED AIR LINES, INC.,
*Appellee.*

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Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

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Argued June 10, 1976—Decided October 1, 1976

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Before HAYNSWORTH, *Chief Judge* and WINTER and CRAVEN, *Circuit Judges.*

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Francis G. McBride for Appellant, Carin Ann Clauss Associate Solicitor, U. S. Department of Labor (William J. Kilber, Solicitor of Labor, Jacob I. Karro, Attorney, U. S. Department of Labor on brief) as Amicus Curiae; Joseph A. Rafferty, Jr. (Earl G. Dolan on brief) for Appellee.

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WINTER, *Circuit Judge:*

This appeal presents a narrow issue: Does the Age Discrimination in Employment Act, 29 U. S. C. §§ 621, *et seq.*, proscribe the retirement of an employee at age 60 when retirement

is brought about solely because of his membership in an employees' retirement plan which contains a provision making retirement mandatory at that age and when the effective date of the retirement plan preceded the effective date of the Act? The answer to the question turns on whether a preexisting pension plan which requires retirement prior to age 65 falls within the exception contained in 29 U. S. C. § 623(f)(2), "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employees benefit plan . . . which is not a subterfuge to evade the purposes [of the Act]." The district court thought the exception applicable, relying principally on *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974). Despite *Brennan* and other authorities, we conclude otherwise. We reverse the summary judgment awarded the employer and remand the case for further proceedings.

I.

The relevant facts are largely stipulated. McMann was hired by United Air Lines (United) in 1944, and served in various capacities, most recently as a "Technical Specialist-Aircraft Systems," until his retirement on February 1, 1973. At the time McMann was hired, United had in effect an employee retirement plan, participation in which was voluntary at the option of employee.[1] Initially, McMann decided not to join the plan. However, in 1964, he elected to participate. The application card he signed, and subsequent documents he received, showed that the "normal retirement age" for employees in his job category was 60.

1. We attach no significance to the fact that McMann could have chosen not to joint the plan. Realistically, an employee's decision whether or not to forego lucrative benefits, funded in part by employer contributions he would not otherwise receive, is not "voluntary" in the sense we think it would have to be in order to find a waiver of statutory protection. Moreover, we doubt that Congress intended employees and employers, either individually or in collective bargaining, to be able to waive rights granted by the Act. There is little question that an attempt to condition employment itself on the surrender of protection against discharge because of age would be legally ineffectual; we see no reason why participation in a retirement plan should be treated differently.



While the meaning of the word "normal" in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the "normal" retirement age. United legally may retain employees such as McMann past age 60, but has never done so: its policy has been to retire all employees at the "normal" age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.[2]

McMann was retired at age 60, in compliance with the plan. It is conceded that the plan is "bona fide" in the sense that it exists and pays benefits. United presented no evidence, however, to show that the provision of its plan requiring retirement at age 60 had any purpose other than arbitrary age discrimination. It sought and obtained summary judgment solely on the theory that since its plan was indisputably adopted prior to the effective date of the 1967 Act, (June 12, 1968) the mandatory retirement provision contained therein was not proscribed.[3]

2. If we were to treat the plan as one permitting United to retire employees at age 60 or later, at its option, we would face the situation confronted by the court in *Brennan, supra.* There, Judge Tuttle argued forcefully in dissent that, "at the very least," to qualify for the exemption early retirement pursuant to a plan would have to be *compulsory* on both the employee and the employer. 500 F. 2d at 220. Judge Tuttle drew support for this conclusion from the statutory language, "it shall not be unlawful for an employer . . . to *observe* the terms of a bona fide" plan. (Emphasis added.) Arguably, if under a plan the employer has discretion not to retire an employee, the employee's discharge is not action taken "to observe" the terms of the plan.

3. Our reversal of United's summary judgment does not finally decide this case even though most of the operative facts have been stipulated. United may have other valid defenses. For example, we note that the Act provides another exemption where age is a "bona fide occupational qualification." 29 U. S. C. § 623(f)(1). United may raise this defense on remand. Of course, we express no opinion as to its applicability to McMann, whose principal duties apparently did not involve flying airplanes, but were managerial in nature. We note, however, that the burden of proving the elements required for

*(Continued on next page)*

## II.

The Age Discrimination in Employment Act generally prohibits an employer from discharging any individual between the ages of 40 and 65 because of age. 20 U. S. C. §§ 623(a)(1), 631. However, as previously stated, 29 U. S. C. § 623(f)(2) provides an exemption from this broad rule.[4] In pertinent part, that section provides that

> [i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

The only reported appellate decision to construe this section is *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974), decided over a sharp dissent by Judge Tuttle.[5] The

*(Continued from preceding page)*

invocation of any statutory exemption will be on United. *Cf.* Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 232 (5 Cir. 1969) (burden on employer to show existence of elements required for bona fide occupational qualification exception under Title VII of the Civil Rights Act of 1964.)

4. United draws our attention to the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which states that "the Act authorizes involuntary retirement irrespective of age." By its terms, this regulation is interpretive, not legislative. *See* 29 C. F. R. § 860.1 (views subject to change in light of court decisions or reexamination by Department of Labor). As evidenced by the Secretary's amicus curiae brief and argument, he has now concluded that the statement in the regulations is erroneous. As we understand the Secretary's present position, it is substantially in accord with the result we reach here. Thus, the regulation has no significance for our decision. We express no opinion as to whether it may provide the basis of a defense under 29 U. S. C. §§ 259, 626(e).

5. See note 2, *supra*.

Four other reported cases have discussed the benefit plan exemption. de Loraine v. Meba Pension Trust, 499 F. 2d 49 (2 Cir.), *cert. denied*, 419 U. S. 1009 (1974), did not deal with the issue presented here. The court explicitly stated: "We also decline to con-

*(Continued on next page)*



*Brennan* majority rested its holding on a reading of the "unambiguous language of the statute," 500 F. 2d at 217, and thus disregarded the legislative history and policy considerations which it conceded might support a different result. We believe the language of the statute is clear, but that the *Brennan* court's interpretation of it is erroneous.

*Brennan's* only discussion of the "subterfuge" clause in the statute is as follows:

> Taft's "Plan" was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion. 500 F.2d at 215.

We find this statement unconvincing because what is forbidden is not a subterfuge to evade the *Act*, but a subterfuge to evade the *purposes* of the Act. These purposes are clearly spelled out in 29 U. S. C. § 621(b), and speak to concerns older than the Act itself:

> It is . . . the purpose of this chapter to promote employmetn of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

*(Continued from preceding page)*

sider at this time the argument of amicus curiae . . . that the Act prohibits involuntary retirement pursuant to a pension plan before age 65. As noted in text, plaintiff did not take this position in the district court." 499 F. 2d at 51 n. 7.

Language in Hodgson v. American Hardware Mutual Ins. Co., 329 F. S. 225 (D. Minn. 1971), which tends to support United's position, is plainly dictum. The court stated at the outset of its opinion: "The parties agree that the Plan is a bona fide employee benefit plan within the meaning of . . . the Act." 329 F. S. at 227.

Steiner v. National League of Professional Baseball Clubs, 377 F. S. 945 (C. D. Cal. 1974), is contrary to our decision. But *Steiner* offers no analysis and relies heavily on the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which is no longer relevant in light of the Secretary's present position. See note 4, *supra*.

The fourth case, Dunlop v. Hawaiian Tel. Co., ..... F. S. ..... (D. Hawaii, June 23, 1976), is discussed in n. 6, *infra*.

Thus, in order to qualify for the exemption, a plan must not be a subterfuge to evade the Act's purpose of prohibiting arbitrary age discrimination. Stated otherwise, there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages. At this stage of the proceedings, United has offered no non-arbitrary justification for the age 60 retirement provision in its plan.

Any other reading of the "subterfuge" clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise-qualified individual, for 29 U. S. C. § 623(f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual . . ." "[C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old." *Hodgson*, 329 F. S. at 229.

III.

The result we reach is fully consistent with the legislative history. While it is often said that resort to legislative history is inappropriate where the statute is clear on its face,

> when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' United States v. American Trucking Assns., 310 U.S. 534, 543-44 (1940) (footnotes omitted), *quoted with approval in* Train v. Colorado Public Interest Research Group, Inc., ____ U.S. ____, ____ (No. 74-1270, June 1, 1976).

The joint House-Senate report on the section of the age discrimination bill that was to become 29 U. S. C. § 623(f)(2) states:

> It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. H. R. Rep. 805, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Adm. News, 2213, 2217.



Thus, Congress in drafting the exemption was concerned that requiring equal participation in employee benefit plans by newly-hired older workers could discourage the employment of such workers, since their age would not permit them to accumulate the years of service necessary to make participation in the plans economically feasible. The fact that the exemption contains the proviso "that no such employee benefit plan shall excuse the failure to *hire* any individual" (emphasis added) confirms that Congress was addressing itself to the problem of the worker hired later in his career, and did not intend to validate plans which discriminate on the basis of age against employees such as McCann who have "earned" their benefits through many years of plan membership.

Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees "to observe the terms of" a plan. However, as we have already observed, in order to escape condemnation as a "subterfuge," an early retirement provision must have some economic or business purpose other than arbitrary age discrimination.

At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the *Brennan* court's conclusion that any action required by a plan predating the Act is valid, since such a plan could never be a subterfuge. While we have already pointed out the fallacy in

this reasoning, it is also refuted by the legislative history. The report states that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans *differently*, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the *maintenance* of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail. United has offered no justification for maintaining its early retirement provision after the Act became effective.[6]

Our reading of the statute and its legislative history is a realistic one. There are over eleven million employees who are members of retirement plans which require retirement before age 65; there are another several million who are members of plans which permit forced retirement before 65.[7] We think it unlikely

6. *Brennan's* conclusion that the subterfuge clause automatically validates the provisions of all pre-Act plans was rejected in Dunlop v. Hawaiian Tel. Co., note 5, *supra*, for much the same reason we discuss in the text. However, the *Dunlop* court upheld a plan permitting involuntary retirement at age 60, based upon an admittedly disingenuous reading of the word "subterfuge" to mean a scheme to retire employees early without payment of substantial benefits. The court felt compelled to reach this result in order to give effect to the Secretary of Labor's interpretative regulation, 29 C. F. R. § 860.110, discussed in note 4, *supra*, which it presumed to mirror congressional intent. The court nevertheless observed that Congress might have intended to allow the exclusion of the aged from a retirement plan but not permit the discharge of aged individuals pursuant to a plan, as we have concluded, in which case "subterfuge" could be given its normal meaning. Apparently the *Dunlop* court did not have the benefit of the Secretary's revised position. Accordingly, to the extent that *Dunlop* relied on the regulation, its authority is weakened.

7. *See* U. S. Dept. of Labor, Monthly Labor Review, Vol. 69, No. 4, p. 41 (April 1973).



that Congress intended to leave the vast loophole in this broad remedial legislation which United would have us fashion. We can foresee no pernicious effects on the nation's employee benefit plans from our decision. Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits.[8] If legitimate considerations other than an employer's preference for youth justify the forced retirement of employees before age 65, 29 U. S. C. § 623(f)(2), as we construe it, permits such action.

REVERSED AND REMANDED.

8. Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees. M. Bernstein, The Future of Private Pensions, 226 (1964).

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-906

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UNITED AIR LINES, INC.,
*Petitioner,*

vs.

HARRIS S. McMANN,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix to the Petition at page A1. The Opinion of the Court of Appeals for the Fourth Circuit, dated October 1, 1976, is reported at 542 F.2d 217. A copy appears in the Appendix to the Petition at page A5.

## JURISDICTION

Petitioners assert this Court's jurisdiction under 28 U.S.C. § 1254(1). Respondent does not question this jurisdiction.

## QUESTION PRESENTED

Does the Age Discrimination in Employment Act of 1967, as amended, permit involuntary retirement prior to age 65 pursuant to a retirement plan adopted prior to the passage of the Act, when such plan would admittedly be in violation of the terms of the Act if adopted after the effective date of the Act?

## STATUTE INVOLVED

Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. § 623 (f)(2)) is set forth at page 2 of the Petition, Sections 4(a) and 4(f) of the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA" or the "Act") are set forth at page A14 of the Appendix to the Petition. However, Respondent makes the following addition of Section 2 of the Act: Section 2 [29 U.S.C. § 621]

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing;



(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

## STATEMENT OF THE CASE

This is an action brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired former employee of Petitioner United Air Lines, Inc. (hereinafter "United") requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement by United at age 60. United based his retirement on his participation in a retirement income plan which covered him and other employees in his job classification.

The facts were stipulated. McMann was born January 23, 1913 and was hired by United April 14, 1944. He continued to serve in the employ of United in various capacities until United forced him to retire. His most recent position was that of "Technical Specialist —Aircraft Systems".

At the time McMann was hired by United in 1944, United had in effect the retirement income plan which provided retirement benefits to employees who were eligible to join and who did join the plan.

McMann did not elect to join the plan until January 23, 1964. At that time, McMann applied for participation in the plan with an effective date of February 1, 1964. McMann participated in the "non-union flight plan" initially, but in June 1965 he was transferred from that plan to the "pilots' pension plan". At various times during his participation in the plan, McMann was sent annual statements and summaries of the plan. All relevant materials he received regarding the benefits of the plan and his participation in it described the "normal retirement age" as age 60.

On January 23, 1973, McMann reached his 60th birthday. On February 1, 1973, the first day of the month following his 60th birthday, McMann was involuntarily retired by United.[1] Shortly before his retirement, McMann served notice on the Secretary of Labor of his intent to sue based upon United's alleged violation of the Act in requiring him to retire at age 60. No satisfactory resolution of the case was reached through this channel and, on January 31, 1975, McMann filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. McMann asserted that his involuntary retirement constituted an act of age discrimination and was unlawful under the Act. United, in its Answer, raised the defense that McMann's retirement was in accordance with the terms of a *bona fide* employment benefit plan within the meaning of Section 4(f)(2) of the Act.

[1] It is interesting to note that, although United forced McMann to retire at age 60, UAL, Inc., United's holding company, recently asked its Chief Executive Officer, Edward E. Carlson, to continue working beyond age 65, presumably his "normal retirement age". *Hanging in There After 65*, BUSINESS WEEK (January 17, 1977) 20, 21.



On July 15, 1975, McMann and United entered into a stipulation of facts. Both parties moved for summary judgment and on August 1, 1975, the matter came before the District Court for a hearing. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr., presiding, granted United's motion for summary judgment and dismissed McMann's suit. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case and filed a brief *amicus curiae* on behalf of McMann. In the Court of Appeals, McMann argued that United's action in forcing him to retire at age 60 constituted a violation of the Act, and that the exemption provided in Section 4(f)(2) of the Act was, under the circumstances, not available to United.

United argued that the District Court's decision was proper in that the Act expressly permits an employer to ". . . observe the terms of any *bona fide* employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act. . . ." United further argued that because the plan was instituted many years before the Act was passed, it could not possibly be considered a subterfuge to evade the purposes of the Act.

At oral argument, United's counsel, responding to a question from the Court, conceded that its plan, if adopted at the present time, would probably violate the Act.[2]

The Court of Appeals entered its Opinion on October 1, 1976, and reversed the District Court. The Court

[2] This concession was noted by the Court of Appeals in its Opinion, 542 F.2d 217, 221.

ruled merely because a pension plan had been in existence prior to the passage of the Act, it did not follow that such a retirement plan was automatically not a subterfuge to evade the purposes of the Act. The Court of Appeals remanded the case to the District Court. United then filed its Petition for a Writ of Certiorari on December 30, 1976.

## REASONS FOR DENYING THE WRIT

### I. The Petitioner Has Not Complied With the Rules of This Court

This Court has promulgated rules of pleading and practice governing the requirements and conduct of cases before it. Supreme Court Rule 23 determines the contents of a Petition for Writ of Certiorari. Failure of a Petitioner to comply with these rules will result in the Court's denial of a Petition for Writ of Certiorari. Rule 23(1)(g) of this Court provides as follows:

> "If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance."

This requirement for jurisdictional statement is similar to that found in Fed. R. Civ. P. 8(a), which requires "a short and clear statement of the grounds upon which the court's jurisdiction depends, . . ." The preferred method for stating jurisdiction is that found in Official Form 2 which accompanies the Federal Rules of Civil Procedure. The illustrative format cites the Act of Congress which gives the court jurisdiction, regardless of the type of jurisdiction. A failure to show jurisdiction in the complaint will result in the dismissal of the suit in the District Court. *KVOS, Inc.* v. *Associated Press,* 299 U.S. 269 (1936).



The statement of the case in the Petition for a Writ of Certiorari is completely devoid of any allegation of the jurisdiction of the Trial Court.

Respondent submits that the Petitioner's failure to comply with the rules of this Court should bar the petitioner from being granted the relief it requests.

### II. There Is No Real Conflict Between the Circuits

Petitioner and *amicus* cite three cases to the Court in order to establish a conflict between the Circuits of the United States Court of Appeals. They cite *Brennan* v. *Taft Broadcasting Co.,* 500 F.2d 212 (5th Cir. 1974); *de Lorraine* v. *MEBA Pension Trust, et al.,* 499 F.2d 49 (2nd Cir.), *cert. denied,* 419 U.S. 1009 (1974), and *Steiner* v. *National League of Professional Baseball Clubs,* 377 F. Supp. 945 (C.D. Cal. 1974), *aff'd.* No. 74-2604 (9th Cir. 1975).

As noted previously, at oral argument in the Court of Appeals, Counsel for Petitioner acknowledged that if its pension plan were adopted today, it would probably be in violation of the terms of the Act. The effect of this admission limits the scope of the question presented. The question becomes only whether or not the age of the employee benefit plan can, by itself, excuse the mandate of Congress as reflected in the Act.

*Steiner, supra,* was decided without opinion by the Ninth Circuit. Rule 21(c) of the Ninth Circuit states that such a disposition "shall not be regarded as precedent . . ." Thus, although the case was decided by the Ninth Circuit, that Court's own rules prevent the consideration of the case to establish a conflict among Circuit Courts of Appeal. The Second Circuit in

*de Lorraine* merely stated its opinion that, because a pension plan antedated the Act, it could not be a subterfuge. That Court, however, did not really consider the issue. It merely said that because it paid benefits and was established before the passage of the Act, the trust was not a subterfuge to evade the purposes of the statute. No basis was given by the Court for the statement, and no examination of the statutory language was undertaken. *de Lorraine* turned not on the question of subterfuge, but rather on the question of whether or not the plaintiff showed any discriminatory effect of the defendant's actions. The Fifth Circuit in *Taft Broadcasting* again did not really consider the issue. The sole language in *Taft Broadcasting,* regarding the question of whether or not a plan which antedated the Act could be a subterfuge, was simply that the plan "was effectuated far in advance of the enactment of the law, eliminating 'any notion that it was adopted as a subterfuge for evasion" (500 F.2d at 215). The court did not consider whether or not a plan could be a subterfuge to evade the purposes of the Act, even though it was in effect before the passage of the Act.

Thus, the Fourth Circuit in *McMann* was the first court to seriously consider the "subterfuge clause" of the Act. As the Fourth Circuit pointed out, what is forbidden is not a subterfuge to evade the Act, but a subterfuge to evade the purpose of the Act. Clearly, the language of the statute can apply to pre-existing pension plans. This was a primary holding of the Court in *McMann.* The purposes of the Act do not change merely because of the time element of a pension plan. The purposes are the same regardless of whether the plan involved is new or old.



The only other circuit to squarely confront the question of whether or not a pre-existing plan can still be considered a subterfuge to evade the purposes of the Act is the Third Circuit. In *Zinger* v. *Blanchette,* — F.2d — (3rd Cir. 1977), decided on January 20, 1977, the Court agreed with *McMann* in holding that a retirement plan which pre-dated the Act can be a subterfuge.

Respondent submits that when the question presented in this case is properly addressed there is not conflict between the Circuit Courts of Appeal. Petitioner admitted on oral argument that if its plan were implemented today it would probably be in violation of the Act. The question is then narrowed to whether a plan which antedated the Act can or cannot be a subterfuge to evade the purposes of the Act. The Courts in *McMann* and *Zinger* are consistent, and these two courts are the only ones which have fully examined the question. There is, therefore, no conflict among the circuits.[3]

### III. The Decision of the Court of Appeals Is Not in Conflict With This Court

The Chamber of Commerce of the United States, as *amicus curiae,* urges this Court to grant the Petition for Writ of Certiorari on the grounds that the Fourth Circuit's decision conflicts with certain decisions of this Court. In support of this contention, the *amicus* cites *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *General Electric Co.* v. *Gilbert,* Nos.

[3] The *amicus,* it should be noted, agrees with this view of the "subterfuge clause". Brief of the Chamber of Commerce of the United States of America as *amicus curiae* at 5, n. 3.

74-1589 and 74-1590, 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976). All three of these cases involve the validity of employment skills and ability tests. The *amicus* quite correctly states that the rule in such cases is that the employers have the burden of establishing that their tests are in fact job related. However, if an employer does this the complaining party must show, under Title 7 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e (1970), that other tests without the undesirable racial effect would also serve the employer's interest.

The *amicus* contends that the Fourth Circuit put a different burden on employers when it requires that the employer must prove the non-existence of a subterfuge as well as the actual benefits of its retirement plan. Respondent submits that the approach taken by the *amicus* is clearly not appropriate to the present issue. It is instead a classic example of adding apples and oranges. In the job testing cases, there is a possibility that many other tests will measure the same skills as a test which may have discriminatory results. While dealing with age discrimination, however, there are not such alternative methods. The discriminatory effect of a validated test may well be inadvertent. However, in an age discrimination case, discrimination on the basis of age is the sole purpose of the retirement plan. The burden on the employer is therefore whether or not the plan can be justified on some other basis.

These cases, cited by the *amicus,* do not deal with the same type of problem or issue that the Court is presented with in the instant case. Respondent therefore suggests that the decision of the Fourth Circuit is not in conflict with the applicable decisions of this Court.



## CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court to deny United's Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

FRANCIS G. MCBRIDE
*Attorney for Respondent*

February 2, 1977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976.

**No. 76-906**

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent's brief in opposition to United's Petition for a Writ of Certiorari primarily states that there is no real conflict between the circuits. This reply brief will address that point.

In his brief, Respondent attempts to reconcile *McMann* with the decision of the Fifth Circuit in *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974) by asserting that in *Taft* the Fifth Circuit "did not consider whether or not a plan could be a subterfuge to evade the purposes of the Act, even though it was in effect before the passage of the Act." (Br. in Opp. p. 8.) This assertion is contrary to the fact. The precise issue decided by the Fifth Circuit in *Taft* was whether the employer's retirement income plan fell within the Section 4(f)(2) exception in the Act. In reaching the decision that the plan

did fall within the Section 4(f)(2) exception, the Fifth Circuit necessarily determined that Taft's plan was not a "subterfuge" within the meaning of that Section. It specifically made this ruling in the following language which appears in the decision (500 F. 2d at 215):

> "Does the defendant-appellee's 'Plan' come within the terms and purposes of the Section 4(f)(2) exception? We respond in the affirmative.
>
> * * * * *
>
> Taft's 'Plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."

Respondent also attempts peremptorily to dismiss the impact of the Ninth Circuit's decision affirming the district court's decision in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974) *aff'd.* No. 74-2604 (9th Cir. 1975) by stating that the rules of that Circuit prevent consideration of the case to establish a conflict among the circuits. (Br. in Opp., p. 7.) In fact, however, the rules of that Circuit do not so state, but prevent only the decision from being cited within the Ninth Circuit. (See footnote 6, page 7, brief of *amicus curiae* Chamber of Commerce.) Steiner is clearly relevant and contrary to *McMann*.

Nor is Respondent's endeavor to reconcile *McMann* with the decision of the Second Circuit in *de Lorraine* v. *MEBA Pension Trust, et al.*, 499 F. 2d 49 (2nd Cir. 1974) persuasive. Respondent asserts that the Second Circuit ". . . merely stated its opinion that because a pension plan antedated the Act, it could not be a subterfuge . . . [but] did not really consider the issue." (Br. in Opp., pp. 7-8.) The fact is that the Second Circuit squarely met and decided the issue by affirming the district court's granting of defendant's motion for summary judgment. The Second Circuit stated (499 F. 2d at 50):

> "We affirm the decisions of the district court.
>
> * * * * *



> MEBA Pension Trust was established in 1955, long before the passage of the Act, and pays substantial benefits to a broad class of workers. Thus, the trust is certainly not itself a subterfuge to evade the purposes of the statute. . . ."

The Second Circuit's decision in *de Lorraine* is the law in that circuit and is clearly contrary to the law in the Fourth Circuit enunciated in *McMann*.

Respondent next cites the newly decided and as yet unpublished decision of the Third Circuit in *Zinger* v. *Blanchette et al.* (3rd Cir. January 20, 1977), No. 76-1249 and describes the effect of that decision as agreeing "with *McMann* in holding that a retirement plan which pre-dated the Act can be a subterfuge." (Br. in Opp., p. 9.) In fact, the *Zinger* decision painstakingly traced the legislative history of Section 4(f)(2) of the Act and concluded, contrary to *McMann*, that a retirement plan which pays reasonable benefits and which provides for mandatory retirement at an age earlier than age 65 is lawful under the Act irrespective of whether it predates or postdates the Act. This is clearly established by the excerpt from *Zinger* quoted below:

> In the case *sub judice*, the parties concede that the plan is bona fide and the pension payable not unreasonable—certainly not so small as to brand the plan a subterfuge to evade the purposes of the Act [Footnote omitted]. The sole attack is that the plan's retirement at age 60 provision unlawfully discriminates because of age. An employee reaching age 60 may be forced to retire because of that fact, although one who is 59 remains at his job. From that viewpoint, there is obviously discrimination because of age, just as there is in any retirement plan—voluntary or involuntary. But that discrimination, existing because of the terms of a bona fide retirement plan, is exempt from the scope of the Act, just as is involuntary retirement at any age beyond 65 or before 40. To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful."

The full text of *Zinger* v. *Blanchette* is reproduced as an Appendix to this reply brief. The excerpt, above, appears at Appendix, pp. A17-A18.

In *Rogers* v. *Exxon Research and Engineering Company*, ..... F. 2d ..... (3rd Cir. January 20, 1977), Nos. 76-1114, 76-1115 decided by the Third Circuit the same day as *Zinger*, *supra*, the Third Circuit reaffirmed its interpretation of the Act in *Zinger* and vacated a contrary decision by the District Court, reported at 404 F. Supp. 324 (D. N. J. 1975).

Respondent also takes the position that the issue in *McMann* differs from the issue in other cases cited by Petitioner because Petitioner's counsel allegedly "admitted" in oral argument before the Fourth Circuit that if United's plan post-dated the Act, it would probably be in violation of the Act. (Br. in Opp. p. 9.)

The fact is, however, that no such concession was made (and is erroneously misconstrued as having been made in the Fourth Circuit's decision). Reference to the transcript of the tape of hearing before the Fourth Circuit reveals that Petitioner's counsel was asked hypothetically what facts Petitioner would have to show to establish that, if a new United retirement plan were inaugurated after the effective date of the Act and called for mandatory retirement at age 55, such plan would not be a "subterfuge" within the meaning of Section 4(f)(2). Petitioner's counsel replied that he was "hard pressed to answer", but did offer an example. At no time did he concede that if United's present plan were adopted post-Act it would probably be in violation of the Act. Indeed, it is conceded in *McMann* that United's plan is *bona fide*, which means it is authentic, genuine and pays substantial benefits. Under *Zinger*, United's Plan clearly would be lawful, even if adopted today.

Respondent makes two other arguments in his brief. One is that the point made by *amicus* in its brief concerning the burden of proof is erroneous. (Br. in Opp., pp. 9-10.) This argument



requires no answer since the point made by *amicus* is self-explanatory and is not refuted by Respondent. The last argument by Respondent is that Petitioner did not state the basis for the district court's jurisdiction in *McMann* as required by rule 23(1)(g) of this Court. (Br. in Opp., pp. 6-7.) As to this matter, the Petition made it clear that the statute involved in *McMann* is the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621, *et seq*. (See Petition, p. 2.) That Act provides in Section 7(c) [29 U. S. C. 626(c)] that any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act. The district court in *McMann* had jurisdiction pursuant to 29 U. S. C. § 626(c).

Wherefore, Petitioner respectfully requests this Court to grant the Petition for a Writ of Certiorari to the Fourth Circuit in *McMann* to settle the conflict between the circuits and resolve an issue of nationwide importance.

Respectfully submitted,

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February 10, 1977.

# APPENDIX



## APPENDIX.

UNITED STATES COURT OF APPEALS,
For the Third Circuit.

No. 76-1249.

WILLIAM F. ZINGER,
*Appellant,*

*vs.*

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, AND PENN CENTRAL TRANSPORTATION COMPANY,
*Appellees.*

Appeal from the United States District Court for the Eastern District of Pennsylvania (D. C. Civil No. 74-2449).

Argued October 8, 1976.
Before: ADAMS, KALODNER* and WEIS, *Circuit Judges.*

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* Although Judge Kalodner was not present at oral argument, counsel, by consent, agreed to his participation in the decision and Judge Kalodner reviewed the record of oral argument.

## OPINION OF THE COURT.

(Filed January 20, 1977).

WEIS, *Circuit Judge.*

Acknowledging the inexorable march of time but unwilling to leave his employment before the customary age of 65, the plaintiff contests his involuntary retirement one year earlier. He contends that an agreement by his employer preceding the formation of the Penn Central Railroad and the Age Discrimination in Employment Act both proscribe his premature retirement. Consequently, he seeks to augment his pension to what it would have been had he remained in service until he reached 65. Though he argues vigorously, we conclude that he cannot prevail on either of his contentions and, therefore, we must affirm the district court's judgment for the defendants.

Only months before his sixty-fifth birthday and despite his protests, the Penn Central Transportation Company retired plaintiff Zinger, making him eligible for pension benefits from several sources, including the Railroad Retirement Fund. However, these payments total $834.12 less per year than he would have received had he continued to work for Penn Central until age 65.

Zinger begain working for the Pennsylvania Railroad Company in 1943, and continued without interruption in the service of its successor, the Penn Central. He served as an attorney in the legal department of the company on a salary basis, and appeared for the railroad in proceedings in the courts as well as before the Interstate Commerce Commission. His efforts were directed chiefly toward claims for freight loss and damage, and did not extend to matters of company policy or the discretion to institute litigation.

Zinger had been a contributing member of the Plan for Supplemental Pensions first put into effect by the Pennsylvania Railroad in 1938 and later amended by the Penn Central in



1974.[1] The Plan provided for payment of pension benefits in addition to those afforded by the Railroad Retirement Act. In 1962, the Pennsylvania Railroad also adopted an "Interim Pension Policy" to pay benefits to those employees retiring before 65, when payments began under the Railroad Retirement Act.

In the preliminary negotiations for the Pennsylvania and New York Central merger, management agreed with the unions to provide extensive job protection for their members. In the course of ICC hearings, concerned in part with the fate of employees who would be affected by the merger, the companies stated that they would extend those benefits to non-union ("non-agreement") personnel as well. The Commission approved the protective agreement as "fair and equitable" to both union and "non-agreement" employees but required the latter group to accept the terms and conditions of the agreement in writing.[2]

On April 5, 1965, the chairman of the board of the Pennsylvania Railroad sent a letter addressed to "PRR Supervisors, Managers, and Officers" explaining some effects of the merger. Mr. Zinger was one of the persons who received this communication. In the body of the letter, the chairman wrote:

> "You will note from Section I, [of the attachment] which applies to you, that non-agreement supervisors, managers, and officers will be offered continued employment until they retire, . . . ."

The attached document, captioned "Personnel Policy for Merger of the Pennsylvania and New York Central Railroads Applying to Supervisors, Managers, Officers and other Employees Not Subject to Agreement with Unions,"[3] listed two classifications

1. After the merger with the New York Central Railroad, plaintiff was no longer required to make contributions to the fund.

2. *See* Pennsylvania Railroad Company-Merger-New York Central Railroad Company, 327 ICC 475, 544-545. The record does not disclose whether the acceptance in writing condition was enforced.

3. There is some confusion about this exhibit in the record. The plaintiff's proposed findings of fact rely upon a different attachment, and the district court did not clarify the situation when

*(Continued on next page)*

of personnel not subject to the union agreement: "I. Supervisors, Managers, and Officers" and "II. Other Employees Not Subject to Agreements with Unions." Paragraph E under the first category read:

> "The company may elect to retire any such person between ages 60 and 65 and he, as well as any such person over 60 years of age who is unwilling to relocate or accept a position in a new field of endeavor, will be provided interim pension allowances . . . ."

On February 19, 1968, soon after consummation of the Penn Central merger, the senior vice president sent a letter to "Management Employees Provided for by the Personnel Policy for Merger of the Pennsylvania and New York Central Railroads." This letter, sent to Mr. Zinger among others, stated in part: "[I]t is a pleasure to reaffirm the Personnel Policy for Merger which applies to you." The policy was reprinted on the reverse side and read in part: "[T]hese policies will apply to managers and officers not subject to the provisions of the ICC Order." Included was a provision for early retirement at the company's election set out in the same verbiage as in the letter of April 5, 1965.

On March 1, 1974, the general counsel for Penn Central told plaintiff that he would be retired very shortly. After Zinger protested and commenced this litigation, his retirement was postponed to October 1, 1974, seven months before his 65th birthday.

In the district court, plaintiff asked for injunctive relief and damages, asserting that as a "non-agreement employee" he could not be involuntarily retired. In addition, he alleged that the early retirement plan violated the Age Discrimination in

*(Continued from preceding page)*

it made its findings of fact. In his post-trial brief in the district court, the plaintiff said, "Plaintiff is therefore basing his case on the printed statement which defendants claim was or should have been attached." We rely upon the contents of the exhibit as reprinted in the appendix filed in this case at page 102a. This version is the one that defendant asserts to be the proper attachment and the one to which plaintiff refers in his brief at pages 20-25.



Employment Act of 1967, 29 U. S. C. §§ 621 *et seq*. The district court rejected both contentions, and entered judgment for the defendants.

Plaintiff's position, as we understand it, is that, as a salaried employee of the railroad, he was entitled to the benefits of the protective agreement approved by the ICC as a condition of the merger. He argues that since the ICC is required to protect the interests of all affected railroad employees in the event of a merger, *see* 49 U. S. C. § 5(2)(f), and "employee" is not defined in the statute, the word should be given its ordinary meaning—one that would include a person in his position. In response, the defendants argue that managers and professional personnel are simply not "employees" within the meaning of § 5(2)(f) and there was no intention to include them in the protective agreement.

Before reaching the question of whether plaintiff was covered by the protective agreement, however, we think it important to determine whether its provisions have the effect Mr. Zinger urges. We conclude that they do not.

The plaintiff cites language in the union protective agreement of May 20, 1964 providing that, upon merger, employees of the Pennsylvania Railroad shall be continued in service "and none of the present employees . . . shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." Mr. Zinger apparently contends that the company's action in retiring him before age 65 was a deprivation of employment. However, the agreement states, "[a]n employee shall not be regarded as deprived of employment or placed in a worse position . . . in case of his . . . retirement. . . ."

The plaintiff also points to a factual stipulation that "[e]mployees subject to the Union Contract dated May 20, 1964, have not involuntarily been retired early by the Penn Central Transportation Company." That fact, however, does not of itself establish a contractual undertaking under the terms of the

protective agreement. All that the record shows is that the ICC order and the offer of the railroads were limited to the terms of the May 20, 1964 writing. There was no understanding that unspecified provisions of other union collective bargaining agreements or practices would be incorporated and applied to non-union employees.

After a careful review of the evidence, we find nothing to show that the protective agreement, even if it covers plaintiff, prohibits the early retirement on a pension otherwise permitted by company policy.

Since he has failed to prove any breach of the protective agreement, we need not decide whether the plaintiff would be considered an "employee" within the terms of the statute or the ICC order. We doubt that he would on the record here because of the lack of evidence to establish the meaning which the railroads and the ICC placed upon the word in their negotiations. Our research and that of counsel has not uncovered any authoritative court decision or ruling of the ICC in which a person in Mr. Zinger's capacity has been considered an "employee" under § 5(f) of the Interstate Commerce Act. Accordingly, we would expect discussion and a specific designation in the proceeding and order if such an unusual result were desired.[4] What evidence there is in this case tends to show an

4. In Norfolk v. W. Railway Co. and New York C & STLR Company Merger, 330 ICC 780 (1967), the Commission stated:

> "We deny the requests of D & H and B & M to extend employee protection to their supervisory, professional and executive personnel. The term "employee" is not defined in the Interstate Commerce Act.
>
> * * * * *
>
> "[T]he record is silent with respect to the cost of protection if it were extended to supervisory, professional and executive personnel. Absent evidence of the effect of this transaction upon such personnel and of their need for protection, *e.g.*, the transferability of their skills, Amalgamated Transit Union v. United States, 253 F. Supp. 481, *aff'd per cur.* 385 U. S. 38 (1966), we would not be justified in providing protective conditions for these personnel." 330 ICC at 825, 826.

Though not relevant to a decision on the legal issues, we learned at oral argument that Mr. Zinger was employed by an industry association soon after his retirement by the Penn Central.



intention to exclude, but since the record is not as complete as it might be, we think it better practice not to issue a definitive ruling. Accordingly, since the record does not demonstrate a breach of the protective agreement, the plaintiff has failed to meet the burden of proof on that issue, and the district court's finding in favor of the defendants was not erroneous.

## II.

Disposition of the protective agreement issue, however, does not end the case. As an alternative, Zinger contends that the Penn Central program authorizing involuntary retirement between the ages of 60 and 65 violates the Age Discrimination in Employment Act of 1967, 29 U. S. C. §§ 621 *et seq.* He asserts that the early retirement provision, although bona fide, is a "subterfuge" and, hence, not within the exception described in 29 U. S. C. § 623(f):

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * * * *
>
> "(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any such individual."

The railroad argues that since the early retirement plan predated the Act, it cannot be considered a subterfuge. We believe this chronological argument lacks merit, and the mere fact that the plan was in existence before the Act was passed is not determinative. The statute speaks of evading the '*purposes*" of the Act—not the Act itself. Thus, a seniority practice or employee benefit plan effective long before the enactment of the statute could, nevertheless, be opposed to its purposes and thus be a subterfuge. Further, the legislative history

is contrary to defendant's position. The House Report, in discussing this particular clause, states:

> "It is important to note that exception (3) [the present (2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill is considered vital [sic] to the legislation, and was favorably received by witnesses at the hearings." H. R. Rep. No. 805, 90th Cong., 1st Sess. (as found in 1967 U. S. Code Cong. and Adm. News p. 2217.)

To this extent, we agree with the conclusion of the United States Court of Appeals for the Fourth Circuit in *McMann* v. *United Air Lines, Inc.*, 542 F. 2d 217 (4th Cir. 1976), and, accordingly, reject the defendant's chronological argument. *But see Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974); *deLoraine* v. *MEBA Pension Trust*, 499 F. 2d 49 (2d Cir.), *cert. denied*, 419 U. S. 1009 (1974); *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974).

Plaintiff's contention is that the Act proscribes involuntary retirement before 65. In a far reaching decision, *McMann* v. *United Air Lines, Inc., supra*, the Court of Appeals for the Fourth Circuit held that the Act, by implication, outlaws all programs providing for involuntary retirement before age 65, whether at the company's option or under mandatory provisions. However, in *Brennan* v. *Taft Broadcasting Co., supra*, the Fifth Circuit held that a bona fide plan providing benefits upon involuntary retirement at age 60 was not a subterfuge and therefore permissible under the Act.

Confronted with diametrically different interpretations by two highly respected courts, we must independently examine the Act and its legislative history.



29 U. S. C. § 623[5] makes it unlawful to *discharge* an individual because of age. No statutory provision explicitly prohibits early retirement on pension. Only two sections mention "retirement": § 623(f)(2) which exempts observance of a bona fide retirement program; and § 624 which requires the Secretary of Labor to study the institutional arrangements giving rise to involuntary retirement and to report his findings, together with any legislative recommendations, to the President and to Congress.

The primary purpose of the Act is to prevent age discrimination in hiring and discharging workers. There is, however, a clear, measureable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor.[6] A careful examination of the legislative history demonstrates that, while cognizant of the disruptive effect retirement may have an individuals, Congress continued

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5. PROHIBITION OF AGE DISCRIMINATION

Sec. 4(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

* * * * *

(f) It shall not be unlawful for an employer . . .— (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

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to regard retirement plans favorably and chose therefore to legislate only with respect to discharge.

In his message of January 23, 1967, the President recommended legislation covering workers from ages 45 to 64 and "provided an exception for special situations . . . where the employee is separated under a regular retirement system." 113 Cong. Rec., pp. 1089-1090. As referred to committee, both Senate and House Bills provided:

> "Sec. 4(f) It shall not be unlawful . . .
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act."

Senator Javits recognized that actuarial considerations in the administration of pension plans might hinder employment of older workers. As he said to the Senate subcommittee:

> "Now, another problem is the operation of established pension plans, some of which provide benefits based to a certain extent on the age of the employee when first hired.
>
> "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuse not to hire older workers when they might have "hired them under a

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> (3) to discharge or otherwise discipline an individual for good cause.

Act of December 15, 1967, Pub. L. No. 90-202 § 4, 81 Stat. 602, 603-604.

6. *See* generally, Hearings on Early Retirement and Related Subject Before the Subcomm. on Retirement and the Individual of the Senate Special Comm. on Aging, 90th Cong., 1st Sess., pt. 2 (1967). *Cf.* Mandatory Retirement: The Law, The Courts, and The Broader Social Context, 11 Willamette L. J. 398 (1975).



> law granting them a degree of flexibility with respect to such matters. That flexibility is what we recommend.
>
> * * * * *
>
> "So, Mr. Chairman, in order to meet these needs, I will introduce the following amendments to S. 830.
>
> * * * * *
>
> "Third, that a fairly broad exemption be provided for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems."[7]

Following this statement, Secretary of Labor Wirtz testified:

> "There is also the effort in S. 830 to make quite clear the relationship which would necessarily be recognized between unjust discrimination and the retirement policies or systems to which Senator Javits has already referred . . . Section 4(a) reflects . . . simply the significant fact that *what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement polices,* a degree of protection against discrimination on the basis of age very much like what has evolved in private experiences and programs."[8] (Emphasis supplied.)

When asked about the effect of the proposed legislation on existing pension and insurance plans, Secretary of Labor Wirtz replied:

> "It would be my judgment . . . that the effect of the provision in 4(f)(2) [the original bill] . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans."[9]

Representatives of organized labor expressed reservations about § 4(f)(2) at the subcommittee hearings in both houses. As a legislative director for the AFL-CIO testified:

7. Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 27-28 (1967).

8. *Id.* at 43.

9. *Id.* at 53.

> "We likewise do not see any reason why the legislation should, as is provided in section 4(f)(2) in the Administration bill, permit involuntary retirement of employees under 65. . . . Involuntary retirement would be forced, *regardless of the age of the employee*, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act."[10]

These witnesses later submitted proposed amendments to strike the provision allowing separation under a retirement policy.[11]

However, the union representatives were not successful in their efforts to remove the retirement provision from the bill, although the protection for seniority systems which they advocated was incorporated in the same section of the Act.

While the present form of § 4(f)(2) differs slightly from its original form in the Senate and House bills, we do not regard the difference as important. In commenting on the amendments which incorporate the present language of the Act, Secretary of Labor Wirtz, in testifying before the House committee, stated:

> "In the bill reported out by the subcommittee in the Senate there is a change in the language which refers to this point which you raised earlier, the relationship of this to established pension plans. We count that change as not

10. Testimony of Andrew J. Biemiller, Director of Department of Legislation, AFL-CIO, Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 96. *See also* pp. 93, 98, 100. *See also* testimony of Kenneth A. Meiklejohn, legislative representative AFL-CIO, Hearings on H. R. 3651, H. R. 3768, and H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 411, 418. The testimony of both men took place after Senator Javits had proposed his amendments. It is obvious that the union representatives thought that the Javits' amendment did not exclude involuntary early retirement.

11. The proposed amendment was titled "Amendment to Eliminate Provision Permitting Involuntary Retirement From the Age Discrimination in Employment Act, and to Substitute Therefor Provision Safeguarding Bona Fide Seniority or Merit Systems." It would have deleted any reference in the exception to retirement plans. and thus have made age 65 applicable to them as it was to

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> going to the substance and involving matters going to clarification which would present no problem."[12]

Further, the text of the adopted amendment, "to observe the terms of any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter," is quite similar to that of the New York statute. That Act provides that its prohibition against age discrimination shall not "affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to avoid the purposes of said subdivision. . . ."

Pennsylvania has a similar statute, Pa. Stat. Ann. tit. 43 § 955, and New Jersey's reads: ". . . nor to interfere with the operation of the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program." New Jersey Stat. Ann. 10:5-2.1. These statutes were introduced into the record at the hearings[13] and were received with interest by the committees. Also introduced were New York's explanatory notes. They unequivocally stated that a plan formulated before enactment of the statute providing for compulsory retirement on pension at age 60 was lawful. When no retirement benefits were provided, however, the bona fides of the plan was subject to examination.[14]

The former Secretary of Labor obviously thought that bona fide retirement programs permitting involuntary retirement before age 65 were exempted from the Act. The interpretive

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other forms of discrimination. For a discussion of the effect to be given committee proceedings, *see* National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U. S. 453, 460-461 (1974).

12. Hearings on H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 40.

13. Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 304, 306 (1967).

14. *Id.* at 251.

bulletin, 29 C. F. R. § 860.110, issued by the Department of Labor soon after enactment of the statute reads:

> "Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.
>
> "(b) This exception does not apply to the involuntary retirement before 65 of employees *who are not participants in the employer's retirement or pension program.* It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress."[15] (Emphasis supplied.)

The bulletin demonstrates the Secretary's recognition of the difference between retirement with and without a pension; the financial effect of the latter being the same as outright discharge. Succeeding Secretaries, however, have revised the Department's position. Pursuant to the statutory directive, the Secretaries have submitted annual reports to Congress through 1976 discussing plans that mandate retirement before age 65. In the

15. 34 F. R. 9709, June 21, 1969. The text has remained unchanged through the 1975 edition of the Code of Federal Regulations despite the Secretary's change in position. *See* 29 C. F. R. § 860.110.

A working paper prepared for the Senate Special Committee on Aging commented that the study on involuntary retirements had not been completed. It suggested that the Secretary could be asked to prepare a report on whether early involuntary retirement should be continued as an exception and, if so, whether such factors as age and amount of reduced retirement benefits should be considered. STAFF OF SENATE SPECIAL COMMITTEE ON AGING, 93d Cong., 1st Sess. WORKING PAPER ON IMPROVING THE AGE DISCRIMINATION LAW (Comm. print 1973, p. 18).



report of January 31, 1976, Secretary Brennan articulated the department's position:

> "[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the plan for the sole urpose [sic] of moving out older workers, which purpose has now been made unlawful by the ADEA."[16]

This is the interpretation that the Secretary urged upon the courts in both *Brennan* v. *Taft Broadcasting Co., supra,* and *McMann* v. *United Airlines, supra.*

In adopting this stance, the Secretary ignored the obvious and important distinction implicit in his previous bulletin between discharge without pay and retirement on a pension. Moreover, the Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committee which declined that proposal when it was forthrightly presented to them. Thus, rather than proposing an amendment to Congress, as Congress had instructed, the Secretary seeks to change the Act by court decision or administrative *fiat.*[17]

There are many cogent, persuasive arguments why involuntary retirement, even with an adequate pension, should not be

16. Dept. of Labor, January 1975 report pertaining to activities in connection with the Age Discrimination in Employment Act of 1967, at 17 (1975).

17. The Supreme Court was confronted with a similar situation in *General Electric* v. *Gilbert,* ..... U. S. ....., 45 U. S. L. W. 4031, 4036 (U. S. Dec. 7, 1976), when it said:

> "The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated

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permitted before age 65.[18] Logically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anomaly that a person who has been involuntarily retired by one company before 65 may not be discriminated against in applying for employment at another company.[19] Similarly, as the Secretary suggests, there may be serious objections to allowing retirement to be at the company's option. As written, however, the statute does not limit its exemption for bona fide plans to those meeting the Secretary's three criteria.

Such arguments miss the mark when urged upon a court in support of a statutory interpretation. An exemption's merits are properly matters of legislative concern and evaluation. Congress has chosen to exclude retirements pursuant to bona fide retirement plans so long as the plan is not a subterfuge. That choice

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at an earlier date, closer to the enactment of the governing statute.

* * * * *

"We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. [citations] In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore* [v. Swift & Co., 323 U. S. 134 (1944)]."

18. *See* Levien, The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments, 13 Duq. L. R. 227 (1974); Agatstein, The Age Discrimination in Employment Act of 1967: A critique, 19 N. Y. L. F. 309 (1973); *cf.* The Constitutional Challenges to Mandatory Retirement Statutes, 49 S. J. L. R. 748 (1975); Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment, 47 S. Cal. L. Rev. 1311 (1974); *But see,* Massachusetts Board of Retirement v. Murgia, 44 U. S. L. W. 5077 (U. S. June 25, 1976).

19. In McMann v. United Air Lines, Inc., supra, the court of appeals reasoned that there is no difference between a mandatory retirement at age 62 and a refusal to hire a person that age, citing Hodgson v. American Hardware Mutual Ins. Co., 329 F. Supp. 225 (D. Minn. 1971). However, the opinion did not note that in the cited case the district court ruled on the "retirement" of the complainant who did not participate in the pension plan and those who did were held to be within the exception of § 4(f)(2).



is binding upon us. As the Supreme Court recently noted, "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Board of Retirement* v. *Murgia,* 44 U. S. L. W. 5077, 5079 (U. S. June 25, 1976).

We leave to congressional consideration the broad policy questions underlying the desirability of regulating the minimum age for compensated involuntary retirement. Factors such as the population's gradually increasing average age and the proper methods of insuring the stability of the Social Security Plan may argue for an even higher retirement age. On the other hand, unemployment prevalent among younger members of society and a developing trend to distribute available employment by the use of a four day work week pull in the opposite direction. Further, the enactment of the Pension Reform Act of 1974 may be an important factor, concerned as it is with the financial stability of retirement plans and transferability of benefits.

The fact that the legislation requires the Secretary to study involuntary retirement and submit legislative recommendations to the President and Congress shows recognition of the problem by the legislature. It chose to await further data before deciding what, if any, further action is warranted. Legislation need not address itself to all the problems in any given area at one time. Particularly when the effects of a policy are not susceptible to accurate prediction, Congress may well decide that prudence dictates a tentative, experimental approach. It is not the function of the courts to accelerate that process when Congress unquestionably is acting within its proper scope.

In the case *sub judice,* the parties concede that the plan is bona fide and the pension payable not unreasonable—certainly not so small as to brand the plan a subterfuge to evade the purposes of the Act.[20] The sole attack is that the plan's retirement

20. *See* Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 Vand. L. Rev. 839,

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at age 60 provision unlawfully descriminates because of age. An employee reaching age 60 may be forced to retire because of that fact, although one who is 59 remains at his job. From that viewpoint, there is obviously discrimination because of age, just as there is in any retirement plan—voluntary or involuntary. But that discrimination, existing because of the terms of bona fide retirement plan, is exempt from the scope of the Act, just as is involuntary retirement at any age beyond 65 or before 40. To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful.

Accordingly, the plaintiff's contentions must fail, and the judgment of the district court will be affirmed.

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910-912 (1974). In Age Discrimination in Employment Under Federal Law, 9 Ga. St. B. J. 114 (1972), the author postulates that if a plan is not obviously a subterfuge on its face, the question of whether it is bona fide is simply a matter of degree.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-906**

UNITED AIR LINES, INC.,
*Petitioner,*

*vs.*

HARRIS S. McMANN,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-906.**

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UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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## BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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On February 22, 1977, this Court granted the Petition of United Air Lines, Inc. (hereinafter "United") for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in this case. This is United's brief on the merits.

### OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix at page 27. The Opinion of the Court of Appeals is reported at 542 F. 2d 217. A copy appears in the Appendix at page 31.

## JURISDICTION.

The Judgment of the Court of Appeals was entered October 1, 1976. United's Petition for a Writ of Certiorari was filed December 30, 1976. Certiorari was granted February 22, 1977. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

## STATUTE INVOLVED.

The Age Discrimination in Employment Act of 1967, as amended,[1] 29 U. S. C. § 621 *et seq.* (hereinafter, "ADEA" or the "Act"). Section 4(a) (29 U. S. C. § 623(a)) of the Act reads as follows:

"Sec. 4.(a) It shall be unlawful for an employer . . .—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act."

Section 4(f) (29 U. S. C. § 623(f)) of the Act reads as follows:

"(f) It shall not be unlawful for an employer . . .—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause."

1. The Act was amended April 8, 1974 by the Fair Labor Standards Amendments of 1974 (Public Law 93-259, 88 Stat. 55). The 1974 amendments, however, involve changes irrelevant to this case.



Section 5 (29 U. S. C. § 624) of the Act reads as follows:

"Sec. 5. The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress."

## QUESTION PRESENTED FOR REVIEW.

Is the involuntary retirement of an employee prior to age 65 in observance of the terms of a bona fide retirement plan adopted many years prior to passage of the Act permissible without further justification where the Act expressly provides that it is not unlawful for an employer ". . . to observe the terms of a bona fide . . . retirement . . . plan which is not a subterfuge to evade the purposes of . . ." the Act?

## STATEMENT OF THE CASE.

This action was brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired employee of United, requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement at age 60 in observance of the terms of a retirement income plan covering him and other employees in his job classification.

The facts were stipulated.[2] McMann was born January 23, 1913 and hired by United April 14, 1944. While with United he held various jobs, his final position at the time of retirement being that of "Technical Specialist—Aircraft Systems", a management position.

When McMann was hired by United in 1944, United had in existence a formal retirement income plan (hereinafter the "Plan") which provided retirement benefits to employees who were eligible to join and who became members of the Plan.[3] These benefits were provided through a group annuity contract entered into between United and two insurance companies. McMann had opportunity to join the Plan on various occasions after he became an employee, but chose not to do so until 1964.

On January 23, 1964, McMann elected for the first time to join the Plan and signed an application card applying to enter the Plan effective February 1, 1964. The Plain provided that the normal retirement age was age 60. Thereafter, McMann was sent annual statements concerning the benefits he had accrued under the Plan, each such statement showing that his retirement would occur at age 60.

Shortly before his retirement, McMann served notice on the Secretary of Labor of his intent to sue based upon United's alleged violation of the Act in requiring him to retire at age 60.[4] A representative of the Secretary of Labor, Mr. Robert E.

2. A copy of the Stipulation, with exhibits, appears in the Appendix at page 11 *et seq.*

3. The Plan was adopted in 1941.

4. McMann, although a management employee at the time of his retirement, held a place on the pilots' seniority roster as a result of his holding a union-covered position earlier. In addition to protesting his planned retirement to the Secretary of Labor, McMann filed a grievance under the Pilots' collective bargaining Agreement protesting his involuntary retirement as a breach of the Agreement. The System Board of Adjustment, with Professor Archibald Cox sitting as neutral, denied his grievance without prejudice to McMann's right to pursue his remedy under the Act. A copy of the System Board's Award and the Opinion of Professor Cox appears in the Appendix at page 19 *et seq.*



Ferguson, Area Director, U. S. Department of Labor, Richmond, Virginia, met and conferred with attorneys for McMann and United in investigating McMann's complaint. Subsequent to these conferences, Mr. Ferguson wrote United's attorney on January 18, 1973, stating as follows:

> "This is in further reference to the above styled matter insofar as the Age Discrimination in Employment Act of 1967 is concerned.
>
> Following my conference with you in this office and my earlier conference with Mr. Francis G. McBride, Attorney for Mr. McMann, I referred the issue of your company's pending involuntary retirement of Mr. McMann, to be effective February 1, 1973, to our Regional Attorney at Nashville, Tennessee.
>
> Regional Attorney Marvin Tincher has now advised that the retirement plan of your company is a bona fide employe benefit plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act. Further, he has held, that since the plan was adopted many years prior to the effective date of the indicated Act, it would not appear that the plan is a subterfuge to evade the purposes of the Act.
>
> In view of the above, this office contemplates no further action with respect to this matter and has advised Mr. McBride to that effect and that we are closing our file. Should you have any questions relative to the above, please feel free to write this office."

On January 31, 1975, McMann filed this lawsuit in the U. S. District Court for the Eastern District of Virginia, Alexandria Division. In essence, McMann asserted that his involuntary retirement on his 60th birthday constituted an act of age discrimination and was unlawful under the Act. The Complaint requested injunctive relief, reinstatement and back pay. United filed its Answer on March 7, 1975 admitting it retired McMann on his 60th birthday, but raising the defense that McMann was retired at age 60 in accordance with the terms of a *bona fide* employee benefit plan within the meaning of Section 4(f)(2)

of the Act and Section 860.110 of the Secretary of Labor's interpretation of the Act.[5]

On July 15, 1975, United and the plaintiff, McMann, entered into a stipulation of facts. Based thereon, both parties moved for summary judgment. On August 1, 1975, the matter came before the District Court and the motions were argued. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr. presiding, granted United's motion for summary judgment and denied McMann's motion. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case by filing a brief *amicus curiae*. McMann's position before the Court of Appeals remained essentially the same; namely, that United's action in requiring him to retire at age 60 constituted a violation of the Act in that he was a member of the "protected" age group under the Act and the purpose of the Act would allegedly be frustrated if United could utilize his membership in the Plan as a means of terminating his active employment at age 60.[6] The Secretary of Labor joined in McMann's position.

United maintained, on the other hand, that the District Court's decision was correct because the Act expressly permits, as an exception to the provision against age discrimination, an employer to ". . . observe the terms of any bona fide employee benefit plan such as a retirement, pension, or insurance plan,

5. Section 860.110 reads in relevant part as follows:

". . . the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). * * *"

6. McMann also argued that United's Plan did not by its terms provide for *mandatory* retirement at age 60 since it provided for normal retirement at age 60. The arbitration award of the System Board of Adjustment appearing in the Appendix at page 19, however, rejected this same argument, pointing out that the established practice at United had been to treat the normal retirement date as a mandatory retirement date. The Court of Appeals also rejected this argument. (542 F. 2d at 219.)



which is not a subterfuge to evade the purposes of this Act. . ." United pointed out that its retirement income plan, which provided for retirement at age 60, was a *bona fide* plan paying substantial benefits and since it was instituted many years prior to enactment of the Age Discrimination Act of 1967, it could not possibly be considered a "subterfuge to evade" the purposes of that Act. United relied upon the clear and unambiguous language of § 4(f)(2), the Secretary of Labor's published interpretive regulations and guidelines regarding § 4(f)(2), and the decision of the Court of Appeals for the Fifth Circuit in the case of *Brennan v. Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974) as well as other decisions discussed hereinafter, as authority for its position.

Following oral arguments on June 10, 1976, the Court of Appeals in *McMann* rendered a decision on October 1, 1976 in which it explicity rejected the *Taft* decision and ruled that it is not enough that a retirement benefit plan be *bona fide* and in existence for years prior to the Act. In essence, the Court held that any retirement plan which contains a provision for mandatory retirement earlier than age 65 must be presumed "a subterfuge to evade the purposes" of the Act; that in order to escape condemnation as a "subterfuge," the employer must prove that ". . . [t]here [is] some reason other than age for a plan, or a provision of a plan which discriminates between employees of different ages; that ". . . an early retirement provision must have some economic or business purpose other than arbitrary age discrimination." (542 F. 2d at 220, 221.) Although recognizing that it would be extremely unlikely that United or any employer could demonstrate such a justification,[7] the Court of

7. In connection with an "economic justification," the Court of Appeals observed that "Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits. . . . Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retiree's." (542 F. 2d at 222 and n. 8.)

*(Continued on next page)*

Appeals remanded the case to the District Court to permit such a showing. United then filed its Petition for a Writ of Certiorari, which this Court granted on February 22, 1977.

## SUMMARY OF ARGUMENT.

It is the position of United in this case that the language of Section 4(f)(2) is clear and ambiguous. That language expressly provides that it is not unlawful for an employer to observe the terms of a bona fide retirement plan which is not a subterfuge to evade the purposes of the Act. In the case at hand, United's retirement Plan is concededly a bona fide plan which pays substantial benefits. The Plan is not a "subterfuge to evade" the provisions of the Act because, given their ordinary meaning, the words "subterfuge to evade" signify a strategem to avoid the application of the Act. In this case, United's Plan was adopted in 1941, years before the Act was adopted in 1967, and cannot logically be held to have been adopted as a strategem to avoid the application of an Act passed some twenty-six years later.

The Department of Labor is the agency empowered to administer the Act. Contemporaneous with the passage of the Act, representatives of the Secretary of Labor issued interpretations of the Act which expressly stated that involuntary retirements prior to age 65 are permissible under Section 4(f)(2) of the Act as long as such retirements are made pursuant to a retirement plan which meets the requirements of Section 4(f)(2) of the Act; *i.e.*, that the plan is *bona fide* and not a subterfuge to evade the purposes of the Act. This interpretation is still the official, current, published interpretation of the Act. The

*(Continued from preceding page)*

The only "business justification" suggested by the Court of Appeals for a mandatory retirement age prior to 65 is "where age is a 'bona fide' occupational qualification." (542 F. 2d at 219, n. 3.) That situation is, of course, explicitly provided for in another exception to the Act, § 4(f)(1), 29 U. S. C. § 623(f)(1) and, therefore, the Court's interpretation would make § 4(f)(2) redundant and meaningless.



position taken in this litigation by the Department of Labor to the effect that there must be an "economic" reason for the involuntary retirement provision has never appeared in the Department's published interpretations and is found nowhere in the Act.

The legislative history of the Act, in addition to the language of the Act itself, establishes that Congress did not intend the Act to bar involuntary retirements before age 65 when made pursuant to *bona fide* retirement plans. The legislative history shows, *inter alia*, that Congress specifically rejected a proposal which would have had that effect.

The decision of the Fourth Circuit in the instant case is unique and without precedent in holding that an admittedly *bona fide* retirement plan executed many years prior to passage of the Act will nevertheless be deemed a subterfuge to evade the purposes of the Act unless justified by the employer for business or economic reasons. Decisions of other Circuits, prior to and after the decision of the Fourth Circuit in this case, have not imposed such a test.

## ARGUMENT.

### I.

### United's Retirement Plan Comes Within the Section 4(f)(2) Exception of the Act, Given Its Plain Meaning.

Section 4(a) of the Act prohibits age discrimination among employees in the protected (age 40-65) group by stating in relevant part as follows:

> Section 4(a). It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 4(f)(2) of the Act excepts certain employer actions from the requirements of Section 4(a) by providing as follows:

> Sec. 4(f). It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual . . ."

Given their plain, literal, meanings, the words "to observe the terms of" which appear in the exception permit an employer to apply or implement the provisions of its retirement plan. A *bona fide* plan is by definition one which is made in good faith without fraud or deceit, and which is not specious or counterfeit. As interpreted by the Fifth Circuit in the case of *Brennan* v. *Taft Broadcasting Co., supra,* the term *bona fide* is synonymous with "genuine" or "authentic". (500 F. 2d at 217.) A "subterfuge" is by definition "deception by artifice or strategem to conceal, escape, avoid or evade," the word "evade" meaning to use "craft or strategem in avoidance". (Merriam Webster's Third New International Dictionary, Unabridged.) Judicially, "subterfuge" has been defined as "a device, plan or the like, to which one resorts for escape or concealment; an artifice employed to escape censure or the face of an argument, or to justify opinions or conduct; an evasion." See *Camden Trust Co.* v. *Gidney,* 301 F. 2d 521, 523 (D. C. Cir. 1962); *Los Angeles Fisheries* v. *Crook,* 47 F. 2d 1031, 1035 (9th Cir. 1931). The term "subterfuge" implies a purposeful intent to circumvent or evade.

United's Plan clearly meets all definitions of *"bona fide"*, above, and, just as clearly, is not a "subterfuge to evade" the purposes of the Act. United's plan, which the Secretary of Labor and Fourth Circuit concedes is "bona fide", was entered into in 1941 in good faith for the purpose of providing benefits upon retirement to employees who chose to join the plan. It provides



for and has paid substantial retirement benefits to a broad class of workers. It is neither "specious" nor "counterfeit". Further, since it was entered into some twenty six years before the Act was passed, the Plan cannot logically be held to be a "subterfuge to evade" the Act or its purposes. The Act was neither anticipated nor in existence when the Plan was adopted.

Although both phrases "*bona fide*" and "not a subterfuge to evade" are used in Section 4(f)(2), they realistically would not appear to have separate meanings. The Wisconsin Supreme Court noted this fact in analyzing state age discrimination laws, some of which, like those in Wisconsin and New York, permit employers to retire employees in observance of the terms of retirement plans which are not "subterfuges" and others of which permit employers to retire employees in observance of the terms of *"bona fide"* plans. The Wisconsin Supreme Court concluded in the case of *Walker Manufacturing Co.* v. *Industrial Commission,* 27 Wis. 2d 669, 135 N. W. 2d 307, 315 (Wis. Sup. Ct. 1965) that:

> "We are satisfied that there is no essential difference between an age discrimination statute proviso phrased in terms of retirement policies or systems that are not a subterfuge, such as contained in [Wisconsin law] . . . and the corresponding provisions of age discrimination statutes which speak in terms of 'bona fide' retirement or pension plans."

Since United's Plan is conceded to be *"bona fide"* in this case, it follows that it cannot logically be considered a "subterfuge" to evade the purposes of the Act.

## II.

**The Department of Labor's Published Interpretations and Opinions Support the Proposition That Involuntary Retirements at Any Age Are Permissible as Long as the Express Language of the Act Is Followed.**

Representatives of the Department of Labor, which agency is charged with administering the Act, issued interpretations of the Act starting on June 18, 1968, six days after the Act became effective, which interpretations were published in the Federal Register and codified at 29 CFR § 860 *et seq.* In relevant part, as amended in 1969, the interpretations read as follows:

> *"Sec. 860.110 Involuntary Retirement before age 65—*
>
> (a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in Section 4(f)(2) is concerned.
>
> "(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional or other arrangements giving rise to involuntary retirement, and any appropriate legislative recommendations to the President and to Congress."



Opinions issued by the Department of Labor's Wage-Hour Administrator have consistently reiterated this position. For example, in an opinion letter date November 15, 1968, the Administrator stated:

> "This exception [§ 4(f)(2)] does not apply, however, to the involuntary retirement before age 65 of employees who are not participants in the employer's pension programs. *Thus, for example, in the case of employees who are participants in your client's pension plan, such employees may be retired involuntarily before age 65, but employees who are not participants in the plan may not be so retired.* Opinion ADEA 100, Nov. 15, 1968. (Emphasis added.)[8]

In one of the earliest cases involving an interpretation of Section 4(f)(2) of the Act, *Hodgson* v. *American Hardware Mutual Insurance Co.*, 329 F. Supp. 225 (1971), the Secretary of Labor conceded in his brief filed August 15, 1970 with the District Court that Section 4(f)(2) of the Act authorizes the involuntary retirement of employees who participate in and receive benefits from a retirement benefit plan. To quote from part of the Secretary's brief (p. 11):

> "* * * The section 4(f)(2) exception was only intended by Congress to authorize involuntary retirement of employees who participate in and receive benefits from a retirement benefit plan.
>
> The United States Department of Labor has always taken this position. * * *"

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8. For other published interpretations of the Secretary of Labor and the initial opinions of the Wage and Hour Administrator which permit post- as well as pre-Act plans to provide for mandatory early retirement, see 29 C. F. R. § 860.110 (1976), published at 33 Fed. Reg. 12227-28 (1968) and 34 Fed. Reg. 322 (1969); ADEA Opinions, Wage and Hour Administrator Clarence T. Lundquist, August 14, 1968, September 6, 1968; ADEA Opinions, Acting Wage and Hour Administrator Ben P. Robertson, April 29, 1969 and April 16, 1970; ADEA Opinion, Wage and Hour Assistant Administrator Francis J. Costello, June 29, 1971.

It is significant to note that no official, published interpretation or opinion issued by the Administrator indicates that the words of Section 4(f)(2) have a meaning different from that described in the Secretary's brief, above. Nowhere does the Administrator state in his official publication or opinions that in order for an involuntary retirement provision of a plan to meet the requirements of Section 4(f)(2), that provision must be shown to be based on "business" or "economic" factors. It was not until cases involving involuntary retirement were recently in litigation and in recent reports to Congress that this new definition of a "subterfuge to evade" the purposes of the Act was revealed—and then not in the context of official, published interpretations, but rather in court documents or reports to Congress. In fact, those provisions of the Interpretative Bulletin quoted above remain the Administrator's officially published Interpretations to this day.

It is generally recognized that the interpretations of a statute by the agency empowered to administer that statute are normally entitled to great deference: *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434-35 (1971) and *Hodgson* v. *American Hardware Mutual Ins. Co.*, 329 F. Supp. 225, 228-9 (D. C. Minn. 1971); however, as this Court made clear in its recent decision in *General Electric* v. *Gilbert, et al.*, ..... U. S. ....., 97 S. Ct. 401, 411 (1976), a second interpretation contradicting an earlier one issued contemporaneously with the enactment of the statute is not entitled to "high marks" and this Court has appropriately declined in the past to defer to administrative guidelines where they conflicted with earlier pronouncements of the agency. In the case at hand, the position newly enunciated by the Secretary of Labor to the Courts and Congress interprets Section 4(f)(2) differently than the former Secretary's original interpretation issued contemporaneously with the Act.

The Court of Appeals for the Third Circuit, in its recent, well-reasoned, decision issued January 7, 1977, in the case of *Zinger* v. *Blanchette, et al.*, ..... F. 2d ....., 14 FEP Cases



497 (3rd Cir. 1977), commented on this change in position of the Secretaries of Labor as follows (14 FEP Cases at 502):

> "The former Secretary of Labor obviously thought that bona fide retirement programs permitting involuntary retirement before age 65 were exempted from the Act. The interpretive bulletin, 29 C. F. R. § 860.110, issued by the Department of Labor soon after enactment of the statute reads:
>
> > 'Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.
> >
> > '(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress.[9] (Emphasis supplied.)

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9. The footnote (15) appearing in the *Zinger* text at this point reads as follows:

> "34 F.R. 9709, June 21, 1969. The text has remained unchanged through the 1975 edition of the Code of Federal Regulations despite the Secretary's change in position. See 29 C. F. R. § 860.110.
>
> A working paper prepared for the Senate Special Committee on Aging commented that the study on involuntary retirements had not been completed. It suggested that the Secretary could be asked to prepare a report on whether early involuntary retirement should be continued as an exception and, if so, whether such factors as age and amount of reduced retirement benefits should be considered. Staff of Senate Special Committee on Aging, 93d Cong., 1st Sess. Working Paper on Improving the Age Discrimination Law (Comm. print 1973, p. 18)."

"The bulletin demonstrates the Secretary's recognition of the difference between retirement with and without a pension; the financial effect of the latter being the same as outright discharge. Succeeding Secretaries, however, have revised the Department's position. Pursuant to the statutory directive, the Secretaries have submitted annual reports to Congress through 1976 discussing plans that mandate retirement before age 65. In the report of January 31, 1976, Secretary Brennan articulated the department's position:

> '[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) essential to the plan's economic survival or to some other legitimate purpose—i.e., is not in the plan for the sole purpose [sic] of moving out older workers, which purpose has now been made unlawful by the ADEA.

"This is the interpretation that the Secretary urged upon the courts in both *Brennan* v. *Taft Broadcasting Co., supra.*, and *McMann* v. *United Airlines, supra.*

In adopting this stance, the Secretary ignored the obvious and important distinction implicit in his previous bulletin between discharge without pay and retirement on a pension. Moreover, the Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committee which declined that proposal when it was forthrightly presented to them. Thus, rather than proposing an amendment to Congress, as Congress had instructed, the Secretary seeks to change the Act by court decision or administrative *fiat*." [Footnote omitted.]



## III.

## The Legislative History of the Act Supports the Legality of Involuntary Retirements Prior to Age 65 When Made Pursuant to a Bona Fide Pension Plan.

In his *amicus curiae* brief to the Court of Appeals in *McMann*, the Secretary of Labor asserted that ". . . involuntary retirement was never once mentioned during the Congressional debates." (Secretary's brief, p. 19.) Contrary to this assertion, the legislative history establishes that involuntary retirements were discussed and in fact intended to be included within the Section 4(f)(2) exception.

Since the Third Circuit's *Zinger* decision discusses this legislative history at length and provides a complete answer to the Secretary's assertion, it is quoted at length as follows (14 FEP cases 500-502):

> "29 U. S. C. § 623 [Footnote omitted] makes it unlawful to *discharge* an individual because of age. No statutory provision explicitly prohibits early retirement on pension. Only two sections mention "retirement": § 623(f)(2) which exempts observance of a bona fide retirement program; and § 624 which requires the Secretary of Labor to study the institutional arrangement giving rise to involuntary retirement and to report his findings, together with any legislative recommendations, to the President and to Congress.
>
> "The primary purpose of the Act is to prevent age discrimination in hiring and discharging workers. There is, however, a clear, measureable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. A careful examination of the legislative history demonstrates that, while cognizant of the disruptive effect retirement may have an individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge.

"In his message of January 23, 1967, the President recommended legislation covering workers from ages 45 to 64 and 'provided an exception for special situations . . . where the employee is separated under a regular retirement system.' 113 Cong. Rec., pp. 1089-1090. As referred to committee, both Senate and House Bills provided:

> 'Sec. 4(f) It shall not be unlawful . . .
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act.'

"Senator Javits recognized that actuarial considerations in the administration of pension rights might hinder employment of older workers. As he said to the Senate subcommittee:

> 'Now, another problem is the operation of established pension plans, some of which provide benefits based to a certain extent on the age of the employee when first hired.
>
> 'The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuse not to hire older workers when they might have "hired them under a law granting them a degree of flexibility with respect to such matters. That flexibility is what we recommend.
>
> * * * * *
>
> 'So, Mr. Chairman, in order to meet these needs, I will introduce the following amendments to S. 830.
>
> * * * * *
>
> 'Third, that a fairly broad exemption be provided for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems.'[10]

10. Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 27-28 (1967). [Footnote 7 in original.]



"Following this statement, Secretary of Labor Wirtz testified:

> 'There is also the effort in S. 830 to make quite claer the relationship which would necessarily be recognized between unjust discrimination and the retirement policies or systems to which Senator Javits has already referred . . . Section 4(a) reflects . . . simply the significant fact that *what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies*, a degree of protection against discrimination on the basis of age very much like what has evolved in private experiences and programs.'[11] (Emphasis supplied.)

"When asked about the effect of the proposed legislation on existing pension and insurance plans, Secretary of Labor Wirtz replied:

> 'It would be my judgment . . . that the effect of the provision in 4(f)(2) [the original bill] . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans.'[12]

"Representatives of organized labor expressed reservations about § 4(f)(2) at the subcommittee hearings in both houses. As a legislative director for the AFL-CIO testified:

> 'We likewise do not see any reason why the legislation should, as is provided in section 4(f)(2) in the Administration bill, permit involuntary retirement of employees under 65. . . . Involuntary retirement would be forced, *regardless of the age of the employee*, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act.'[13]

11. *Id.* at 43. [Footnote 8 in original.]

12. *Id.* at 53. [Footnote 9 in original.]

13. Testimony of Andrew J. Biemiller, Director of Department of Legislation, AFL-CIO, Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 96. *See also* pp. 93, 98, 100. *See also* testimony of Kenneth A. Meiklejohn, legislative representative, AFL-CIO,

*(Continued on next page)*

"These witnesses later submitted proposed amendments to strike the provision allowing separation under a retirement policy.[14]

"However, the union representatives were not successful in their efforts to remove the retirement provision from the bill, although the protection for seniority systems which they advocated was incorporated in the same section of the Act.

"While the present form of § 4(f)(2) differs slightly from its original form in the Senate and House bills, we do not regard the difference as important. In commenting on the amendments which incorporate the present language of the Act, Secretary of Labor Wirtz, in testifying before the House Committee, stated:

> 'In the bill reported out by the subcommittee in the Senate there is a change in the language which refers to this point which you raised earlier, the relationship of this to established pension plans. We count that change as not going to the substance and involving matters going to clarification which would present no problem'."[15]

As the Third Circuit also noted in *Zinger*, the text of the Section 4(f)(2) exception is similar to that appearing in New

*(Continued from preceding page)*

Hearings on H. R. 3651, H. R. 3768, and H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 411, 418. The testimony of both men took place after Senator Javits had proposed his amendments. It is obvious that the union representatives thought that the Javits' amendment did not exclude involuntary early retirement. [Footnote 10 in original.]

14. The proposed amendment was titled "Amendment to Eliminate Provision Permitting Involuntary Retirement From the Age Discriminaton in Employment Act, and to Substitute Therefor Provision Safeguarding Bona Fide Seniority or Merit Systems." It would have deleted any reference in the exception to retirement plans, and thus have made age 65 applicable to them as it was to other forms of discrimination. For a discussion of the effect to be given committee proceedings, *see* National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U. S. 453, 460-461 (1974). [Footnote 11 in original.]

15. Hearings on H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 40. [Footnote 12 in original.]



York, Pennslyvania and New Jersey statutes, which statutes were introduced into the record at the Senate Sub-Committee meetings,[16] accompanied by New York's explanatory notes. These unequivocally stated that a plan formulated before enactment of the statute which provided for compulsory retirement on pension at age 60 was lawful. However, if the plans provided no retirement benefits, then the *bona fides* of the plan were subject to scrutiny.[17]

Moreover, Section 5 of the Act (29 U. S. C. § 624), which directs the Secretary of Labor to undertake a study of institutional and other arrangements giving rise to involuntary retirement and to report his findings and any appropriate legislative recommendations to the President and Congress, demonstrates that the subject of involuntary retirements was left to future legislation, since the Act as passed did not ban such retirements.

Clearly, the legislative history establishes that involuntary retirements prior to age 65, pursuant to *bona fide* retirement plans, were not intended by Congress to be banned by that Act. Rather, the language of Section 4(f)(2), as written, was intended by Congress to permit involuntary retirements prior to age 65 as long as the retirement plan was *bona fide; i.e.*, pays reasonable benefits.

## IV.

## Other Courts Have Rejected the Conclusion Reached by the Fourth Circuit in McMann.

No other court which has ruled on this issue has reached the conclusion of the Fourth Circuit in *McMann*. Prior to the *McMann* decision, the Second, Fifth and Ninth Circuits reached conclusions contrary to *McMann*, as did several district courts.

16. 14 FEP Cases at 502. The hearings referred to were the hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., at 304, 306 (1967).

17. Hearings, *id.* at 251.

Subsequent to *McMann*, and with all decisions including *McMann* before it, the Third Circuit rejected the *McMann* decision in *Zinger*, quoted at length hereinabove.

Prior to the *McMann* decision, the Fifth Circuit, in *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974), held that the involuntary retirement of an employee at age 60 pursuant to a retirement income plan which pre-dated the Act and which paid substantial benefits did not constitute age discrimination in violation of the Act. The Fifth Circuit affirmed judgment on behalf of the employer, holding that such retirement was permissible under the clear language of Section 4(f)(2) of the Act. In explaining why the employer's plan met the criteria of Section 4(f)(2), the Fifth Circuit stated that the plan was *bona fide* because it existed, was genuine and authentic, and paid benefits. Its statement appears as follows (500 F. 2d at 217):

> "Given its ordinary and commonly accepted meaning, the term bona fide is synonymous with "genuine" or "authentic", Webster's New Collegiate Dictionary, 1953. The stipulated facts show that Taft did have a plan, that it truly existed, and that Jones was paid approximately $15,000 as a result of it. It was both authentic and genuine. * * *"

With respect to the question of whether the employer's plan was a "subterfuge" which might not come within the Section 4(f)(2) exception, the Fifth Circuit stated (500 F. 2d at 215):

> "Does the defendant-appellee's 'Plan' come within the terms and purposes of the Section 4(f)(2) exception?
> "We respond in the affirmative.
>
> "Taft's 'Plan' was instituted in 1963. Jones exercised his option to participate in 1963. The Act was approved December 15, 1967. Quite obviously, Congress sought to avoid legal and constitutional problems likely to arise from any ex post facto effort to invalidate existing employee benefit plans. Consequently, it included the Section 4(f)(2) exception.
>
> "Its language is plain: 'a bona fide *employee benefit plan* such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter [emphasis ours]'. The key phrase is 'employee benefit plan.' The words, 'retirement, pension, or insurance,' are added in a clearly description sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any.
>
> "Taft's 'Plan' was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion."



The Court in *Taft* also rejected the argument that the Section 4(f)(2) exception was available only if there was a "cost" impact on the employer, as urged by the Secretary of Labor. As stated by the Fifth Circuit (500 F. 2d at 217):

> "The primary difficulty [with this approach] is that it attempts to use legislative history to override the unambiguous language of the statute."

In *de Loraine* v. *MEBA Pension Trust*, 499 F. 2d 49 (2nd Cir. 1974), a case decided approximately three months before *Taft*, the Second Circuit Court of Appeals stated: (499 F. 2d at 50):

> "The Age Discrimination in Employment Act provides that it shall not be unlawful for a labor organization 'to observe the terms of . . . any bona fide employee benefit plan such as a . . . pension . . . plan, which is not a subterfuge to evade the purposes of this chapter. . . .' 29 U.S.C. § 623(f)(2). MEBA Pension Trust was established in 1955, long before the passage of the Act, and pays substantial benefits to a broad class of workers. *Thus, the trust is certainly not itself a subterfuge to evade the purposes of the statute. . . .*" (Emphasis added.)

And in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C. D. Cal. 1974), *affirmed* No. 74-2604 (9th Cir. Oct. 15, 1975), the plaintiff baseball umpire contended that the retirement income plan for umpires which called for retirement at age 55 was a subterfuge to avoid the purposes of the Act. Rejecting this contention, the District Court stated (377 F. Supp. at 948):

> "Of course, this Retirement Plan was put into practice long before there was any proscription against employment practices where discrimination because of age was found. *Obviously it could not have been evolved in an attempt to circumvent any public policy or law.*"

In *Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Haw. 1976), appeal docketed, No. 76-2874 *sub. nom. Usery* v. *Hawaiian Telephone Co.* (9th Cir. 1976), the Court upheld the involuntary retirement of an employee who was covered by a retirement plan providing for retirement at age 60. The Court ruled that the plan in question was a *bona fide* employee benefit plan within the meaning of Section 4(f)(2) and was not a subterfuge to evade the purpose of the Act because the plan was one which paid substantial benefits.

And in *Dunlop* v. *General Telephone Co.*, ..... F. Supp. ....., 13 FEP Cases 1210, appeal docketed, No. 76-2371 *sub nom. Usery* v. *General Telephone Co.* (9th Cir., 1976), the Secretary of Labor filed suit alleging that the defendant telephone company's action in involuntarily retiring seven employees prior to age 65 in accordance with the terms of a retirement plan violated the Act. In that case, the right of the defendant unilaterally to retire salaried employees who were eligible for early retirement was a right which had been in the Plan continuously since 1929. Whether employees were retired early or not made no material difference in the financing of the Plan. The Secretary of Labor conceded that the plan in question was not a subterfuge to evade the purposes of the Act. The District Court found for the defendant, holding that the Section 4(f)(2) exception is "clear and unambiguous," that the plan was "authentic" and "genuine", and was concededly not a "subterfuge" to evade the purposes of the Act.

Also, in *McGovern* v. *United Air Lines, Inc.*, ..... F. Supp. ....., Civil Action 75 C 309 (N. D. Ill. 1975), a case involving a United Flight Navigator involuntarily retired at age 60 pursuant to United's retirement income plan, the plaintiff



Navigator made essentially the same arguments concerning his retirement being a violation of the Act as did McMann. The District Court rejected these arguments, stating, in relevant part, that (Slip Opinion, p. 6):

> ". . . The normal retirement date for flight navigators under the plan . . . has been age 60 since 1948. It is clear from this chronology that the plan in question substantially predates the Age Discrimination Act of 1967. We hold, accordingly, that it is a bona fide plan which was not adopted to evade the purposes of the Act."

See also *Hodgson* v. *American Hardware Mutual Ins. Co.*, 329 F. Supp. 225 (D. C. Minn. 1971) (involuntary retirement of plan member at age 62 permissible under Section 4(f)(2); *Grossfield* v. *W. B. Saunders Co.*, 1 FEP Cases 624 (S. D. N. Y. 1968) (denial of injunction restraining involuntary retirement before age 65 on basis that Section 4(f)(2) permits such retirements); *Stringfellow* v. *Monsanto Co.*, 320 F. Supp. 1175 (W. D. Ark. 1970) (Court concluded, *inter alia*, that employer properly observed the terms of a bona fide employee benefit plan in placing on early retirement employees below age 65) and *McKinley* v. *Bendix Corporation*, 420 F. Supp. 1001 (W. D. Mo. 1976) (Involuntary retirement at age 55 under plan which pays substantial benefits meets Section 4(f)(2) requirements and is not unlawful).

Subsequent to the decisions, above, including *McMann*, the Third Circuit, in January, 1977, issued its decision in the *Zinger* case, *supra*. In *Zinger*, the employer railroad had a plan for supplemental pensions which was inaugurated in 1938. Zinger, the plaintiff, was a member of the plan from the time it was inaugurated. The plan provided for the payment of substantial benefits—at least, according to the court, not so insubstantial as to make the plan a sham or "subterfuge". Several months before the plaintiff reached his 65th birthday, the employer railroad retired him involuntarily. The plaintiff thereupon brought suit claiming, *inter alia*, a violation of the ADEA.

The Third Circuit, after examining the language of the Act including, in particular, the Section 4(f)(2) exception, and after tracing the legislative history and Secretary of Labor's interpretations, all as quoted previously, concluded that the involuntary retirement of the plaintiff was permissible under the Act.

According to the Third Circuit, it did not agree with the Fifth Circuit's decision in *Taft* that the existence of a retirement plan which pre-dated the Act meant that the plan could not under any circumstances be a subterfuge to evade the purposes of the Act, nor did it agree with the Fourth Circuit's decision in *McMann* that a business or economic justification must be present before the Section 4(f)(2) exception becomes applicable. The Third Circuit held in *Zinger* that the Act simply was not intended to ban involuntary retirements prior to age 65 by either its language or Congressional intent—that its focus was on hiring and discharge, not retirements—and that as long as a retirement plan was *bona fide* and not a subterfuge, *i.e.*, as long as the plan paid reasonable benefits, then involuntary retirements pursuant to its terms at ages prior to 65 were permissible *irrespective* of whether the plan pre-dated or post-dated the Act. As stated in part by the Third Circuit in *Zinger* (14 FEP Cases at 504):

> "In the case *sub judice*, the parties concede that the plan is bona fide and the pension payable not unreasonable—certainly not so small as to brand the plan a subterfuge to evade the purposes of the Act. [Footnote omitted.] The sole attack is that the plan's retirement at age 60 provision unlawfully discriminates because of age. An employee reaching age 60 may be forced to retire because of that fact, although one who is 59 remains at his job. From that viewpoint, there is obviously discrimination because of age, just as there is in any retirement plan—voluntary or involuntary. But that discrimination, existing because of the terms of bona fide retirement plan, is exempt from the scope of the Act, just as is involuntary retirement at any age beyond 65 or before 40. To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful."



## V.

## United's Retirement Income Plan Is Concededly Bona Fide and Meets the Criteria of Zinger, Taft and Other Decisions; the Criteria Established by the Fourth Circuit in McMann Is Erroneous.

In the *amicus curiae* brief filed by the Solicitor of Labor with the Court of Appeals in *McMann*, the Solicitor concedes that United's plan is *bona fide*, meaning it is a genuine plan which pays substantial benefits. As stated in the Solicitor's brief (pp. 8-9):

> ". . . the language in Section 4(f)(2) sets forth four specific conditions which must be met before the exception applies: (1) the employee benefit plan must be 'bona fide'; (2) the action taken must be in 'observ[ance]' of the terms of that plan; (3) the plan or the particular terms of the plan relied on must not be a 'subterfuge to evade the purposes of [the ADEA]'; and (4) the plan cannot excuse the failure to hire any individual. *United's plan would appear to meet the first of these four conditions—i.e. it is bona fide. . . .*" (Emphasis added.)

The Appellant in the Court of Appeals, McMann, did not assert then or in the District Court below that United's plan was not *bona fide* or that it does not provide reasonable benefits. The Fourth Circuit agreed the Plan is *bona fide*.

This being so, United's plan meets the criteria of *Zinger*, *Taft* and other cases. In *Zinger*, the Third Circuit established the criteria that if the employer has a plan which pays reasonable benefits and provides for involuntary retirement prior to age 65 (whether that plan pre-dates or post-dates the Act) it is lawful. In *Taft*, the criteria established by the Fifth Circuit for lawfulness is that the retirement plan be *bona fide* (authentic and genuine and pay substantial benefits) and not a subter-

fuge to evade the Act (which, it said, it cannot be if the plan was originated well in advance of the ADEA). The decisions of the Second Circuit in *de Loraine* and of the Ninth Circuit in *Steiner*, as well as the District Court decisions cited above, are consistent with *Taft* and *Zinger* insofar as they hold that a retirement plan pre-dating the Act and paying substantial benefits comes within the Section 4(f)(2) exception.

United's plan is concededly *bona fide*, it pays substantial benefits, and long pre-dates the Act. It meets the criteria of *Zinger, Taft, Steiner, de Loraine* and other cases. It clearly falls within the Section 4(f)(2) exception.

The criteria established by the Fourth Circuit in *McMann* is unrealistic, contrary to the plain language of Section 4(f)(2) of the Act, and contrary to the Congressional intent, as revealed by the thorough analysis contained in the *Zinger* decision. The *McMann* decision constitutes an erroneous interpretation of the Act.

## CONCLUSION.

For the reasons set forth above, United respectfully requests this Court to reverse the decision of the Fourth Circuit and affirm the judgment of the District Court.

Respectfully submitted,

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April 8, 1977.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-906**

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UNITED AIR LINES, INC.,
*Petitioner,*

vs.

HARRIS S. McMANN,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT HARRIS S. McMANN

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### OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix at page 27. The Opinion of the Court of Appeals for the Fourth Circuit, dated October 1, 1976, is reported at 542 F.2d 217. A copy appears in the Appendix at page 31.

## JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1), and *certiorari* was granted, —— U.S. ——, 97 S.Ct. 1098 (1977) on February 22, 1977, under this section. The Judgment of the Court of Appeals was entered October 1, 1976, and the Petition for Writ of Certiorari was filed December 30, 1976.

## STATUTE INVOLVED

The statute to be considered in this case is the Age Discrimination in Employment Act of 1967, as amended, 91 Stat. 602, 29 U.S.C. §§ 621, *et seq.* (1970) (hereinafter "ADEA" or the "Act"). Subsections (a) and (f) of Section 4 of the Act (29 U.S.C. § 623 (1970)) and Section 5 of the Act (29 U.S.C. § 624 (1970)) are set out at pages 2-3 of Petitioner's brief. However, Respondent makes the following addition of Section 2 of the Act (29 U.S.C. § 621 (1970)), which provides:

> "(a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."



## QUESTION PRESENTED

Is the involuntary retirement of an employee, pursuant to a pension plan which antedates the Act and which has a "normal retirement age" of 60, permissible under the Age Discrimination in Employment Act of 1967.

## STATEMENT OF THE CASE

This is an action brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired former employee of Petitioner United Air Lines, Inc. (hereinafter "United") requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement by United at age 60. United based his retirement on his participation in a retirement income plan which covered him and other employees in his job classification.

The facts were stipulated. McMann was born January 23, 1913 and was hired by United April 14, 1944. He continued to serve in the employ of United in various capacities until United forced him to retire.

His most recent position was that of "Technical Specialist—Aircraft Systems".

At the time McMann was hired by United in 1944, United had in effect the retirement income plan which provided retirement benefits to employees who were eligible to join and who did join the plan.

McMann did not elect to join the plan until January 23, 1964. At that time, McMann applied for participation in the plan with an effective date of February 1, 1964. McMann participated in the "non-union flight plan" initially, but in June 1965 he was transferred from that plan to the "pilots' pension plan".

At various times during his participation in the plan, McMann was sent annual statements and summaries of the plan. All relevant materials he received regarding the benefits of the plan and his participation in it described the "normal retirement age" as age 60.

This language precisely tracked the language of the plan itself [1] which consists of an annuity contract between United and Connecticut General Life Insurance Company and John Hancock Mutual Life Insurance Company. The Plan also provides for both early retirement and superannuated employment of participants.

On January 23, 1973, McMann reached his 60th birthday. On February 1, 1973, the first day of the

[1] Part 32 of the Plan, "SPECIFICATIONS—PILOTS" provides "A Participant's Normal Retirement Date is the first day of the month following his 60th birthday." There is no language in the Plan that further defines "normal retirement age".



month following his 60th birthday, McMann was involuntarily retired by United.[2] Shortly before his retirement, McMann notified the Secretary of Labor of his intent to sue, based upon United's alleged violation of the Act in requiring him to retire at age 60. No satisfactory resolution of the case was reached through this channel and, on January 31, 1975, McMann filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. McMann asserted that his involuntary retirement constituted an act of age discrimination and was unlawful under the Act. United, in its Answer, raised the defense that McMann's retirement was in accordance with the terms of a bona fide employment benefit plan within the meaning of Section 4(f)(2) of the Act.

On July 15, 1975, McMann and United entered into a stipulation of facts. Both parties moved for summary judgment and on August 1, 1975, the matter came before the District Court for a hearing. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr., presiding, granted United's motion for summary judgment and dismissed McMann's suit. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case and filed a brief *amicus curiae* on behalf of McMann. In the Court of Appeals, Mc-

[2] It is interesting to note that, although United forced McMann to retire at age 60, UAL Inc., United's holding company, recently asked its Chief Executive Officer, Edward E. Carlson, to continue working beyond age 65, presumably his "normal retirement age". *Hanging in There After 65*, BUSINESS WEEK (January 17, 1977) 20, 21.

Mann argued that United's action in forcing him to retire at age 60 constituted a violation of the Act, and that the exemption provided in Section 4(f)(2) of the Act was, under the circumstances, not available to United.

United argued that the District Court's decision was proper in that the Act expressly permits an employer to ". . . observe the terms of any *bona fide* employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act. . . ." United further argued that because the plan was instituted many years before the Act was passed, it could not possibly be considered a subterfuge to evade the purposes of the Act.

At oral argument before the Fourth Circuit, Counsel for United, responding to a question from the court, stated that he would be "hard pressed" to give facts upon which United could, under the Act, justify a new pension plan with a retirement age of 55. Although he attempted to give such facts, the court obviously was not swayed by his answers, and, in fact, considered that he had conceded that if the plan were set up today, it would violate the Act.[3]

The Court of Appeals entered its Opinion on October 1, 1976, and reversed the District Court. The Court ruled that merely because a pension plan had been in existence prior to the passage of the Act, it did not follow that such a retirement plan was automatically not a subterfuge to evade the purposes of the Act. The Court of Appeals remanded the case to the

[3] This "concession" was noted by the Court of Appeals in its Opinion, 542 F.2d 217, 221.



District Court. United then filed its Petition for a Writ of Certiorari on December 30, 1976, which was granted on February 22, 1977.

## SUMMARY OF ARGUMENT

There are many policy reasons, particularly economic, which dictate in favor of allowing a person to work as long as he is able to and wants to. The person, the plan, the employer and society all benefit financially from postponing retirement.

The language of Section 4(f)(2) of the ADEA does not have a "plain meaning". The statute should therefore be construed to give effect to the broadest remedial intentions of Congress, which has identified the elderly worker as deserving of special protection. Such a construction requires that there must be some criteria other than age before involuntary retirement can be allowed.

The legislative history of the ADEA is somewhat inconclusive. This record reflects no intention to allow involuntary retirement, but the language of the statute appears to allow some involuntary retirement. Since there was no apparent legislative intent to allow involuntary retirement, the statute should be construed accordingly.

Congress, in the language of the statute, has explicitly placed the burden of proof of showing that a plan is not a subterfuge to evade the purposes of the Act on the employer. Decisions by this Court under Title VII of the Civil Rights Act of 1964 are consistent in placing the burden of showing an exception to the operation of that Act on the employer.

The position of the Secretary of Labor does not conflict with prior interpretive bulletins of the Department. The bulletins, by their terms, are interpretive, and further, the primary measure of the acceptability of the plan under Section 4(f)(2) is the language of that section. It is precisely the meaning of this language which is the issue before this Court.

Finally, the terms of United's pension plan require an affirmance of the decision below. Although the question was not reached by the Fourth Circuit, the exception in the statute requires that a retirement plan be mandatory. The plan only specifies a "normal" retirement date and does not compel retirement at age 60.

## ARGUMENT

### I. POLICY CONSIDERATIONS FAVOR THE VIEW TAKEN BY THE LOWER COURT

The problem of retirement involves many different areas which must be considered. Economics, sociology, psychology, and physiology, all play a role in decisions about retirement.

The basic policy choice with respect to the employment of aged persons has already been made by the Congress, at least within the statutorily protected age range from 40 to 65.[4] The basic policy as enunciated by the Congress is set forth in 29 U.S.C. § 621. It is obvious from the language of that provision that Congress has deliberately chosen to maximize the employment of older persons.

[4] See 29 U.S.C. § 631 (1970).



In addition to this congressionally enunciated policy, there are many other policy considerations which support the Fourth Circuit's decision. Economically, the question of retirement at age 60 has many ramifications. First, from the point of view of the retiree, retirement at age 60 can be economically devastating. A person is not eligible for Social Security old age benefits until his 62nd birthday. This, of course, means that a person, such as McMann, cannot possibly receive Social Security benefits for at least two years after his retirement. Even when he is eligible for Social Security at age 62, he must, unless he wishes to wait until he is age 65, accept a reduced level of benefits. This reduced level of benefits does not end at age 65, but it continues throughout the life of the pensioner. This is done without any realistic choice being given to the recipient, as it is virtually necessary that the retiree elect to receive Social Security benefits at age 62 under such circumstances. By being forced to retire at age 60, the pensioner also normally receives a smaller amount in retirement benefits under a pension plan than if he were allowed to continue contributing to the plan until his 65th birthday, or until a later retirement date.

Additionally, an individual's "work-life" earnings are increased by prolonging his working career. An increased work-life has several beneficial economic effects: a higher standard of living is prolonged for the worker; his period of economic dependency is decreased; the worker has an increased opportunity to accumulate funds for his retirement period; and his role as a producing member of society is prolonged.

Second, the use of a later retirement date has economic effects on the plan itself. As Professor Bernstein points out, the pension plan costs less to fund and maintain:[5]

> "Savings comes from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees."

In fact, a pension plan with a mandatory retirement age of 60 requires a 51% greater level of funding accumulation to achieve the same level of benefits as a plan which requires retirement at age 65.[6] A later retirement date can also result in increased benefits to all participants in the plan without a corresponding increase in the funding. A longer working life can likewise result in savings to the employer by allowing him a longer period to amortize the cost of training the employee. This is especially important in industries where training is very expensive or prolonged.

The type of analysis applicable to the cost of a pension plan is also applicable to the cost of paying Social Security benefits. The younger the age of the recipient at the commencement of benefits, the longer the period of time during which benefits must be paid, and the greater the amount of money which must be paid. The higher the age for commencement of bene-

[5] M. C. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS, 224, 226 (1964).

[6] W. C. GREENOUGH & F. P. KING, PENSION PLANS AND PUBLIC POLICY, 233. (1976). The delay of benefit payments past age 65 results in a similar rate of cost savings to the plan.



fits, the lower the cost of the program will be, or the higher the benefits which can be paid at the same cost. This has been recognized by Congress in the 1972 amendments to the Social Security Act. A recipient can now delay receiving Social Security benefits past his 65th birthday, and, for each month that he delays and continues working, his Social Security benefits are increased by 1/12th of 1%, up until his 72nd birthday.[7]

Demographic trends also play an important role in the selection of proper alternatives in this area. At the present time, there is a substantial shifting in the age of the population of the United States, which is becoming older. There are several reasons for this. First, the increased life expectancy of the population means that there are more and more people living to a greater age. Second, the "post-war baby boom" has fizzled, and the birth rate is declining to the point where a zero growth rate is being approached. This means that as the crop of post-war babies ages, their influence will be out of proportion to the rest of the population. One effect of this will be an increased percentage of "dependent" persons as these people reach retirement age. Presently, there are approximately three persons working who support one social security recipient. When the age shift in the population reaches its peak, there will be one person dependent upon social security to two people who are working. Increasing the work-life span will help to ameliorate this situation.

It should be noted that both Social Security payments and payments under an employee benefit plan

[7] 42 U.S.C. § 402(w) (Supp. 1974).

have an inflationary effect on the general economy. This is because the worker is not actively producing in the economy, but is simply being paid as a non-producer.

Most pension plans do not increase their benefits after the participant's retirement. This, of course, means that the participant has a stagnant income in an inflationary society, leaving him far behind in actual purchasing power. This leads to the further result that the economic gap between retired persons and employed persons is growing, since presently employed workers are much closer to having their income keep pace with inflation than the retired persons. This simply exacerbates the economic deprivation of older Americans.

Finally, personal preference will play a large role in the economic effects of a retirement system. While at present it is impossible to say how many persons would work beyond a given age, if given the choice, such determinations could be easily made by an actuary once a small amount of experience has been accumulated. Of course, not all participants would elect to work as long as possible. Many would retire early, and many more would retire at the "normal" retirement age. There would, nonetheless, be some who shared the sentiments of Mr. Justice Samuel Miller who did "not believe a healthy man of 70 years accustomed to any kind of work, mental or physical, ought to quit it suddenly".[8]

Retirement, especially involuntary retirement, has certain physiological effects on the retiree. While the

[8] Quoted in C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 391 (1939).



precise extent of such effects is unknown, recent work in the field indicates that the effects can be severe. Mortality rates for mandatorily retired employees can be as much as 30% higher than what would normally be expected in the third year of retirement.[9] Additionally, mandatory retirement can lead to a general decline in the state of the health of the retiree.[10] These effects are apparently the result of disenchantment with the enforced idleness which accompanies involuntary retirement.

Retirement also has sociological and psychological effects on the retiree. The effects primarily are the feeling of uselessness and isolation caused by the withdrawal of employment, and the actual increased isolation from society that normally accompanies retirement. These effects are obviously inter-related with the medical and economic effects of retirement and it is virtually impossible to show where each effect is derived from.[11]

It is submitted that all of these policy considerations support the position taken by the Fourth Circuit, and that the opinion of that Court should be affirmed.

[9] Haynes, *Survival After Voluntary and Involuntary Retirement* to be published in NATIONAL INSTITUTES OF HEALTH, PROCEEDINGS OF THE CONFERENCE ON THE EPIDEMIOLOGY OF AGING (1977).

[10] AMERICAN MEDICAL ASSOCIATION, COMMITTEE ON AGING, RETIREMENT—A MEDICAL PHILOSOPHY AND APPROACH (1971).

[11] *See e.g.*, H. A. RHEE, HUMAN AGING AND RETIREMENT (1974). Rhee takes what he calls a "cross-disciplinary" approach to the problem of aging and retirement, as no one discipline, by itself, can satisfactorily solve all of the problems involved in the area of aging.

## II. SECTION 4(f)(2) OF THE ACT DOES NOT HAVE A "PLAIN MEANING" AND IT SHOULD THEREFORE BE CONSTRUED IN LIGHT OF ITS PURPOSE

The Act declares its purpose is to "promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment . . ." 29 U.S.C. § 621(b). Underlying the Act is Congress' finding that "the setting of arbitrary age limits regardless of job performance has become a common practice . . ." 29 U.S.C. § 621(a)(2). In order to prevent such discrimination, Section 4(a)(1) of the Act makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1).

United, however, argues that the forced retirement of McMann is exempt from the operation of the Act under the terms of Section 4(f)(2) of the Act (29 U.S.C. § 623(f)(2)), which provides in relevant part:

> "It shall not be unlawful for an employer . . . (2) to observe the terms of a . . . bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

Judge Tuttle's comment, in his dissent in *Brennan* v. *Taft Broadcasting Company,* 500 F.2d 212, 220 (5th Cir. 1975), that "the language of the statute creating an exception, if, in fact, it really does create an exception, is not artfully worded" is probably the most accurate of all judicial statements made concerning this provision.



Nevertheless, United and the Chamber of Commerce argue that the plain meaning of this Section exempts United's plan from the operation of the Act. This is despite the fact that three United States Circuit Courts of Appeal have considered the meaning of the exemption and they have reached three radically different results. In *Taft Broadcasting* the majority of the Fifth Circuit held that the statute did have a plain meaning and that the operation of Taft Broadcasting's profit-sharing plan was exempt from the operation of the Act. Judge Tuttle, in his dissent, reached a completely different conclusion. He not only disagreed as to the outcome of the case on its merits, but he disputed that the statute did, in fact, have a "plain meaning". The most persuasive argument in favor of Judge Tuttle's position is the very fact that he dissented, based on his interpretation of the meaning of the statute. In the court below, the Fourth Circuit reached a result which was completely contrary to that of the Fifth Circuit.[12] The lower court held that, in order to come within the statutory exception, the defendant must show some reason, other than the mere age of the plaintiff. The third case under the Act is *Zinger* v. *Blanchette,* 549 F.2d 901 (3rd Cir. 1977). The Third Circuit, faced with the conflict between *Taft Broadcasting* and *McMann,* resorted to an examination of the legislative history of the Act, and concluded that the Act was not aimed at the prohibition of involuntary retirement.

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[12] McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976).

The examination of these three opinions can lead to only one conclusion: that Section 4(f)(2) has no "plain meaning". In the absence of a "plain meaning" of the statute, it should be construed in light of its purposes and legislative history (discussed *infra*).

As is obvious from the purposes enunciated in Section 2 of the Act, the Act is remedial in its nature. That is, it was intended to remedy an existing wrong. Since the Act is remedial in nature, it should be liberally construed to give effect to the Congressional intent. *Peyton* v. *Rowe,* 391 U.S. 54 (1968). It should also be remembered that by passing a remedial statute, the Act, Congress has singled out a particular group, older workers, for special protection. Congress is the branch of government which is institutionally designed to identify and weigh various social values. *See, Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 109-110 (1949).

Not only does the remedial nature of the statute mandate a liberal construction of the Act, but exceptions to the general provisions of the Act require narrow construction. *A. H. Phillips, Inc.* v. *Walling,* 324 U.S. 490 (1945), *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290 (1959); *Arnold* v. *Ben Kanowsky, Inc.,* 361 U.S. 388 (1960). Further, as Justice Murphy wrote with respect to the Fair Labor Standard Act in *A. H. Phillips,* 324 U.S. at 493.

> "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard for the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and the announced will of the people."



It is upon such an exemption that United relies, specifically the exception for bona fide employee benefit plans in Section 4(f)(2).

Statutes should also be construed to each of the terms used by the legislature. A pension plan must therefore be both "bona fide" and "not a subterfuge to evade the purposes of the Act" in order to fall within the exception of Section 4(f)(2). While the term "bona fide" has not been precisely defined by the courts, both the Third and Fourth Circuits have used, as a working definition, the term to describe a plan which pays substantial benefits to the participant.[13]

The "subterfuge" clause requires somewhat more analysis. The "bona fide" and "subterfuge" provisions cannot be read as being equivalent to each other. To do so is obviously to disregard the fact that Congress put both requirements in the statute, not one. Therefore, even if "bona fide" means "paying substantial benefits", the "subterfuge" clause requires more than the mere payment of benefits.

The Act clearly provides that a retirement plan must not be a subterfuge to evade the *purposes* of the Act. These purposes are clearly spelled out in Section 2 of the Act, *supra.* Essentially, the purpose is to prohibit arbitrary age discrimination in employment.

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[13] Although both courts have used the term "substantial benefits", neither court has attempted to say what the parameters of such benefits could be. It is conceivable that under certain circumstances, retirement at half salary could easily be considered to be "without paying substantial benefits."

Therefore, if this clause is to have any meaning, there must be something other than a simple criterion of age. Any other construction of the Section 4(f)(2) exception "would be too wide a door through which the content of the Act would disappear." *Schultz* v. *Wheaton Glass Company,* 421 F.2d 259, 265-266 (3rd Cir.), *cert. denied,* 398 U.S. 905 (1970). The Third Circuit in *Zinger,* although allowing involuntary retirement before the age of 65, seemed to be aware of the ironic situation which would flow from its decision when it noted:

> "[l]ogically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anamoly that a person who has been involuntarily retired by one company before 65 may not be discriminated against by applying for employment at another company." 549 F.2d at 909.

It is clear that the statute must be construed to require some criteria other than age for an involuntary retirement. To simply allow involuntary retirement with a pension of some unknown magnitude flies in the face of the purpose of the statute. To allow such a broad exemption from the operation of the statute would be virtually to gut the statute of any practical meaning.

### III. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT

The Fourth Circuit, in reaching its decision, examined the legislative history of the Act as an aid to the construction of the statute. The court concluded that Congress did not intend to allow forced retirement under the Act.



An examination of the legislative history should focus on the Committee Reports and the floor debates prior to a vote on the Act as these reflect the intent of Congress, as a body, most clearly. This examination shows that the Congress was concerned with the protection of pension and benefit plans by allowing an employer to exclude a newly hired older person from such plan.

The joint House-Senate report on the bill states, with reference to the provision that became U.S.C. § 623(f)(2):

> "It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans." [14]

At the time the Senate voted on the Act, Senator Javits, who introduced the amendment giving Section 4(f)(2) its final form, made the following statement by way of introducing discussion of the benefit plan provisions:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers,

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[14] H.R. REP. No. 805, 90th Cong., 1st Sess. 4 (1967); S. REP. No. 723, 90th Cong., 1st Sess. 4 (1967).

actually be discouraged from hiring older workers." [16]

This was followed by a colloquy between Senator Javits and Senator Yarborough, the floor manager of the bill, regarding the meaning of the provision. Senator Javits stated:

> "The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others.
>
> "I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. . . .
>
> "MR. YARBOROUGH. [I]t means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." [16]

[16] 113 CONG. REC. 31,254-31,255 (1967).



This understanding of the language of the bill was shared in the House of Representatives. Representative Smith stated:

> "Since the language of sec. 4(f) is not clear, the language of the report is important. The report states that: 'This exception serves to emphasize the primary purpose of the bill—hiring older workers—by permitting employment without necessarily including such workers in employee benefit plans.'" [17]

Representative Daniels stated that the provision was intended to protect employers by not necessitating the participation of older works in such benefit plans:

> "The point should be made, however, that the bill takes into full consideration the problems and interests of employers. It allows for situations in employment where age is a bona fide occupational qualification for a particular job. It also takes account of the problems of employers in the field of pension and other benefit plans. The bill would

[16] *Id.* at 31,255. See also the remarks of Senator Young, *id.* at 31,256, dealing with mandatory retirement.

[17] *Id.* at 34,745.

permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits." [18]

These statements indicate a clear and unequivocal understanding by Congress of the bill's intent. There was virtually no discussion on the floor about involuntary retirement. The only issue addressed was the participation in benefit plans.

Although the legislative intent is clear, the language of the statute is not, when compared to the intent. As the Fourth Circuit stated:

> "Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees 'to observe the terms of' a plan." 542 F.2d at 221. (Emphasis original)

It should be pointed out that no party to this case has argued, nor did the court below hold, that all involuntary retirement is prohibited by the Act.

The problem is presented as a question of what must be shown under the ADEA before an employer can force an employee to retire. The legislative history of the Act can be used to show what Congress intended, and to show what the attitude of Congress

[18] *Id.* at 34,746.



was toward the problem. The intent of Congress was to promote the employment of older workers, and to allow them to be excluded from benefit plans if this was necessary for the economic protection of the plans. The Act should be construed to give effect to this intent.

## IV. THE DECISION BELOW PROPERLY REFLECTS THE ASSIGNMENT OF THE BURDEN OF PROOF UNDER THE STATUTE TO THE EMPLOYER

The Chamber of Commerce of the United States of America, as *amicus curiae,* asserts that the burden of proof, on the question of whether or not a pension plan is a subterfuge under the Act, is shifted back to the plaintiff if the defendant has demonstrated that the plan is bona fide. This argument is based on cases decided by this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 *et seq.* (1970). The *amicus* quite correctly states that the rule in such cases is that, once a plaintiff has made out a prima facie case, the employers have the burden of showing their tests are in fact job related. When this is done, the complaining party must then show that other tests, without an undesirable discriminatory effect, would serve the employer's interest equally well.

The *amicus* contends that the Fourth Circuit put a different burden on employers when it requires that the employer must prove the non-existence of a subterfuge as well as the actual benefits of its retirement plan. While it is true that the employer must prove both of these elements, this is, in fact, exactly equivalent to the burden which this Court has imposed in

the Title VII cases. 42 U.S.C. § 2000e-2(h) (1970) provides that an employer may use any professional developed ability tests "provided that such test, its administration or action upon results is not designed, intended or use to discriminate because of race, color, religion, sex, or national origin." The burden which this Court has placed on employers under this section is precisely equivalent to the exception provided in the statute. The employer must show that the ability test is not designed, intended or used to discriminate. As a practical matter, this is done by showing that the skills measured by a particular test are job related. *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971). In *Griggs,* this Court stated that

> "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

The same situation is true under the ADEA. The exception in Act for employee plans is premised upon two conditions. First, that the plan is bona fide, and second, that the plan is not a subterfuge to evade the purposes of the Act. This is the language which Congress placed in the provision granting the exception to the Act, and, as *Griggs* shows, the employer must meet the burden of proof in order to show that he comes within the exception to the Act.

The contention of the *amicus* that the burden cannot be on the employer because "no party can prove a negative" is belied by the very cases which are cited in support of its argument. As pointed out above, the burden under 42 U.S.C. § 2000e-2(h) is also a negative burden. The employer must show that the test has



*not* been designed or used with a discriminatory purpose. This obviously is proving the negative, and this goal has obviously been achieved, as reflected by this Court's decisions in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975).

It should also be noted that the references to "subterfuge" and "pretext" which *amicus* refers to are not based upon statutory language in the Title VII cases, but are instead simply statements by courts, including this Court, that relief may be granted to plaintiffs even though the defendant has apparently compiled with the statutory requirements. Under ADEA, however, the language is found in the statute. It is used to limit an exception to the purposes of the Act. Under such circumstances, the burden of proof must clearly fall upon the employer.

## V. THE CURRENT POSITION OF THE SECRETARY OF LABOR IS COMPATIBLE WITH THE INTERPRETIVE BULLETINS ISSUED BY THE DEPARTMENT OF LABOR

It is suggested, both by United and by the Chamber of Commerce, that the Fourth Circuit erred in that it disregarded the "contemporaneous administrative regulations" issued by the Department of Labor subsequent to the effective date of the Act. They suggest that the interpretive bulletin issued by the Secretary is in direct conflict with the position taken by the Secretary, as *amicus,* in the Fourth Circuit. They suggest that, in light of such conflict, the initial regulations should be followed, and the current position of the Secretary should be ignored.

While not presuming to speak for the Deparment of Labor, who will file an *amicus* brief in this Court, respondent submits that the Fourth Circuit did not err in accepting the Secretary's position. Essentially, there is no conflict between the Secretary's published regulation and his position in this litigation.

On June 21, 1968, nine days after the effective date of the Act, the Secretary's interpretive bulletin on involuntary retirement was issued, 33 Fed. Reg. 9172. This became 29 C.F.R. § 860.110:

> "§ 860.110 Involuntary retirement before age 65.
>
> (a) Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned."

As a part of the process of issuing interpretive bulletins, the Secretary issued some guidelines as to the purposes of the interpretive bulletins. 29 C.F.R. § 860.1 provides:



> "§ 860.1 Purpose of this part.
>
> This part is intended to provide an interpretive bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it' (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect."

It is important to note several things with respect to the purpose of the interpretive bulletin. First of all, to state the obvious, it is an interpretation. It is not a regulation with the force of law.[19] It was merely intended to be a practical guideline, and nothing more. It was certainly never intended to be an ironclad rule, as is indicated in the provision itself. Section 860.1 simply states that it will guide the Department of Labor, but only until otherwise directed by a court, or until the Department concludes, through its own internal processes, that an interpretation is incorrect.

An examination of § 860.110 is in order. The bulletin quotes the language of the statute and then states only that involuntary retirement is permissible when the requirements of Section 4(f)(2) are met. The

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[19] *See, e.g.*, 29 C.F.R. Part 850.

bulletin itself does not, in any way, attempt to define or delineate precisely what those requirements are. The requirements of Section 4(f)(2) are, in fact, what are being litigated in this case. The precise question involved here is whether United's pension plan does meet the requirements of Section 4(f)(2).

Petitioner's reliance on *General Electric Co.* v. *Gilbert*, —— U.S. ——, 97 S.Ct. 401 (1976), is therefore somewhat misplaced. The later regulation in *Gilbert* was in direct conflict with other indicia of the proper interpretation of the statute, including the language used when the bill was being amended in the Senate. In the case of § 860.110 there is no conflict. While it is true that the bulletin may not clarify the requirements of Section 4(f)(2), it certainly does not give carte blanche to involuntary retirement.

The position of the Department of Labor with respect to the Section 4(f)(2) exemption has been published in the annual reports to Congress under the Act. The Department of Labor's position is that a mandatory retirement provision is unlawful unless such provision:

> "(1) is contained in a bona fide pension or retirement plan;
>
> (2) is required by the terms of the plan and is not optional; and
>
> (3) is essential to the Plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the Plan for the sole [p]urpose of moving out older workers, which purpose has been made unlawful by the ADEA." [20]

[20] U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1974, 17.



This position is consistent with both the interpretative bulletin issued by the Secretary and with the language of the statute. The first condition tracks the language of the statute and that of the interpretive bulletin. The second provision is a logical conclusion reached by an interpretation of the statute which is consistent with its purposes. The third provision again reflects the Congress' concern with the protection of existing benefit plans. A considerable portion of the legislative history is concerned with the economic effects the Act might have on existing pension plans, and this third requirement is certainly consistent with the Congress' intent not to cause harm to these plans by the provisions of the Act.

*Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), states the weight to be given an administrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control." 323 U.S. at 140. When these standards are applied to the Secretary's present position and the position reflected in the interpretative bulletin, it is apparent that the Secretary's position is entitled to the "high marks" of *Gilbert*. The Secretary's present position has been based upon an exhaustive study of a legislative history of the statute; it is not inconsistent with the earlier bulletin; and the rationale behind it is sound. Further, the "policies are made in pursuance of official duty, based upon more specialized experience and broader investigation and information. . ." *Skidmore, supra* at 139. It is interesting to note that the first

interpretative bulletin came out immediately after the effective date of the statute. In fact, the Department of Labor produced an entire chapter in the Code of Federal Regulations in approximately ninety days. Such time limitations obviously are not conducive to a thoroughness in the consideration of the regulations.

One further issue needs clarification at this point. At no time has the Department of Labor said that there can be no forced retirement before age 65. The position of the Department is that there simply must be more than the chronological age of a participant in a pension plan. This is premised, as pointed out previously, on the purpose of the statute, which is to prevent discrimination based solely upon age.

## VI. UNITED'S PILOTS PENSION PLAN, BY ITS TERMS, DOES NOT MANDATE RETIREMENT AT AGE 60, AND THEREFORE CANNOT BE WITHIN THE EXCEPTION OF SECTION 4(f)(2)

As pointed out previously, the actual pension plan involved in the case is a group annuity contract between United and two insurance carriers.[21] Neither McMann nor his union, the Air Line Pilots Association, had any control over the language in this contract concerning retirement dates. The terminology used in it was determined by the parties to the contract. Yet it is upon the unprecise language of this contract that United relies.

The language used in the annuity contract is that the "normal" retirement date of a participant in McMann's job category is the first day of the month next following his 60th birthday. Nowhere in the

[21] See p. 4, *supra*.



plan is there a definition of "normal" or any indication that such language means "mandatory". Contrariwise, there are provisions elsewhere in the contract that provide for retirement prior to age 60 and continued employment beyond age 60, with the consent of the employer. Further, McMann did not even see or have knowledge of the terms of the contract. He was provided only with summaries of the Plan, and these summaries only referred to the "normal retirement date" of the participant. These summaries made no mention of any obligation on the part of a participant to retire on the "normal retirement date", either by precise terms or by implication.

There have been only two instances where appellate courts have discussed the definition of "normal retirement date" under the Act. In the present case, the Fourth Circuit briefly touched on the issue[22] but did not find it necessary to decide it because its decision was based on broader grounds. It simply noted that the definition was not clear. In *Brennan* v. *Taft Broadcasting Co., supra,* the question was addressed by Judge Tuttle in his dissent.

Judge Tuttle, in his dissent, adopted the Department of Labor's argument in favor of a strict construction of an exception to the statute. He then pointed out that,

> "There is no categorical statement that the 'normal date of retirement' is the compulsory date. . . . Without this language, of course there is nothing to warrant a construction of the document to mean 'compulsory' date rather that 'normal' date of retirement. The statement that the

[22] 542 F.2d at 219.

normal date of retirement is age sixty clearly implies that there are other dates within the minds of the parties.

. . .

"In light of this requirement for a narrow construction of the statute, it would seem that at the very least, in order for a purported 'plan of retirement' to be permitted to withdraw employees from the protection of the Act, such plan must state in categorical terms that its members are subject to compulsory retirement at a time or under conditions differing from those of the statute. As pointed out above, this purported plan falls far short of containing any such provision." (*Id.* at 219, 220)

In the present case, McMann, like Mr. Jones in *Taft Broadcasting,* was informed only that the "normal" retirement age was 60. The material received by McMann was completely devoid of any categorical statement that retirement at age 60 was mandatory.

On the other hand, in *Hodgson* v. *American Hardware Mutual Insurance Co.,* 329 F.Supp. 255 (D. Minn. 1971) the court determined that the Defendant (the insurance company) could not retire an employee who was not a member of the pension plan with a mandatory retirement age of 62. The court noted (329 F.Supp. at 229) that the employer could discriminate by retiring a plan member before the age of 65. However, the court also pointed out that

"[r]etirement at age sixty-two for Plan members is permitted only because it is pursuant to the Plan. . . . The Defendant employer retires female Plan members at age sixty-two because it is *compelled* to do so under the terms of the Plan." *Id.* at 228 (emphasis added).



It is respectfully submitted that this "normal" terminology is not sufficient to allow United to force the retirement of McMann. The word "normal" has been construed in a number of cases dealing with a variety of problems. The cases are concerned with such diverse areas as water flows (*United States* v. *Fallbrook Public Utility District,* 109 F.Supp. 28 (S.D. Cal., 1952)) and water levels (*Payette Lakes Protective Ass'n.* v. *Lake Reservoir Co.,* 68 Idaho 111, 189 P.2d 1009 (1948)), and tax cases involving excess profits taxes (e.g., *New York Shipbuilding Corp.* v. *United States,* 237 F.Supp. 995 (D. N.J. 1965)).

The common element in the process that the courts in such cases use in determining the definition of the word is to look to a basic source, the dictionary. The word has slightly varying definitions, depending on which dictionary is consulted, but the following two are typical:

"1. Conforming with or constituting an accepted standard, model or pattern, especially, corresponding to the median or average of a large group in type, appearance, achievement, function, development, etc.; natural; standard; regular."[23]

"1. According to, constituting, or not deviating from an established norm or principal; conformed to a type standard or regular pattern;

. . .

5. Relating to or conforming with long-run expectations or to a permanent standard deviations from which on the part of individual economic

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[23] WEBSTERS NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, 2D ED. (1974).

phenomena are to be regarded as self-correcting; 6.a. Approximately a statistical norm or average.'"[24]

While some argument may be made for the choice of a "standard" or "norm" definition, these reasons are not persuasive. First, the language of the Plan is being scrutinized in the light of the Act. Since the ADEA is a remedial statute, it should, as pointed out *supra,* be liberally construed. Statutory exceptions to it should be narrowly construed. It logically follows that the device, i.e., the Plan, upon which such an exception is premised should also be strictly construed, so as to give the broadest possible effect to the remedial purposes of the Act. The broadest practical definition of "normal" should therefore be used. Second, the other provisions of the Plan itself dictate that a strict definition of "normal" is improper. The Plan contains provisions allowing earlier than normal and later than normal retirement. It is disingenuous, at the least, to argue that the Plan requires strict adherence to a standard when the Plan itself contains alternatives to this standard. It is clear beyond doubt that other than "normal" dates for retirement are contemplated by the Plan. Third, arguments that the practice under the Plan was uniform in requiring retirement at age 60, and participants could therefore expect nothing else but retirement at age 60, simply beg the question. Whether such action is lawful or whether it is unlawful discrimination is the precise question that must be answered by this Court. To have used uniform past practice as criteria for decision would have led to opposite results in many of the

[24] Websters Third New International Dictionary (1964).



major cases decided by this Court. One example will suffice: Prior to 1954, the school system of Topeka, Kansas had a uniformly applied practice of racial segregation. Students in that school system knew of this uniform practice, and could expect nothing but such segregation. This Court unanimously determined that, prior uniform practice notwithstanding, such segregation violated constitutional standards. *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Additionally, such uniformity might only mean that no one had previously objected to such retirement.

The problem of choosing the appropriate definition of "normal" is also analogous to the interpretation of a contract. In the normal situation, when there is a dispute about the meaning of the terms of a contract, a provision is construed against the drafter of the questioned provision.[25] By analogy, the terms of the Plan should be construed against United, since McMann had no part in the drafting of the contract provision.

In this regard, *Gould* v. *Continental Coffee Company,* 304 F.Supp. 1 (S.D.N.Y. 1969), is also relevant. In *Gould,* the court held that the failure to communicate the provisions of a profit-sharing plan to an employee would relieve the employee of the provisions of the plan which were detrimental to him. The court further held that "[a]ny discrepancy which existed between the plan and its summary must be construed against its draftsman and in favor of plaintiff employee". *Id.* at 3. Logically, this is equally applicable to ambiguities in the language of the plan. This be-

[25] 17A C.J.S., *Contracts* § 324 (1963). *See also,* Alcoa S.S. Co. v. United States, 338 U.S. 421, 424-425 (1949).

comes even clearer when it is recalled that United attempts to use a jargon definition of the word and that McMann can claim absolutely no knowledge or experience in the semantics of annuity contracts. To expect a layman to have knowledge of a specialized use of a word is unrealistic.

When these definitions are considered along with the of construction set forth above, it is clear that the statutory framework and the very words of the plan require a determination that United's Pilots Pension Plan is not within the exception to the statute. In the construction of a remedial statute, with an exception, the statute must be construed liberally in order to give effect to the purpose of the statute. Further, an exception limiting the operation of a statute must be strictly construed. The legislative history and the legislative purpose show that the clear intent of § 4(f)(2) was to protect older workers from discrimination, and not to give employers a vehicle for discriminating against them.

## CONCLUSION

For the reasons hereinbefore set forth, Harris S. McMann, Respondent, respectfully prays this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit, and to remand this case to the United States District Court for the Eastern District of Virginia, Alexandria Division.

Respectfully submitted,

FRANCIS G. MCBRIDE
*Attorney for Respondent*

June 25, 1977

FOR ARGUMENT

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-906**

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. McMANN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## REPLY BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## REPLY BRIEF FOR PETITIONER.

Six arguments have been advanced by the Respondent, McMann, in his brief in support of the decision of the Fourth Circuit in this dispute. Additionally, three arguments have been advanced by *amicus curiae,* National Retired Teachers Association, *et al.* in its brief in support of the Fourth Circuit's decision. United shall treat first with McMann's arguments, then treat with the arguments advanced by the *amicus* Teachers Association.

### I.

### McMANN'S ARGUMENT THAT POLICY CONSIDERATIONS FAVOR THE VIEW TAKEN BY THE COURT BELOW.

McMann urges this Court to support the decision of the Fourth Circuit in this case because, in "addition to . . . congres-

sionally enunciated policy, there are many other policy considerations which support the Fourth Circuit's decision." (Resp. br., p.9.) McMann then discusses such policy matters as the reduced level of earnings of retirees, the lessening of opportunities by retirees to accumulate earnings, the economic impact of later retirement dates on pension plans, the shifting age of the population of the United States, which is becoming older, the effect of retirements on social security and the psychological and sociological effects of retirement on retirees.

These "policy considerations" addressed to this Court by the Respondent are misdirected. It is for Congress to determine whether laws should be enacted or amended based upon policy considerations of the nature described by Respondent. As aptly stated by the Third Circuit in *Zinger* v. *Blanchette*, 549 F. 2d 901, 909 (3rd Cir. 1977) in answering the same arguments in that case:

> "Such arguments miss the mark when urged upon a court in support of a statutory interpretation. An exemption's merits are properly matters of legislative concern and evaluation. Congress has chosen to exclude retirements pursuant to bona fide retirement plans so long as the plan is not a subterfuge. That choice is binding upon us. As the Supreme Court recently noted, 'the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.' *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L. Ed 2d 520 (1976).
>
> We leave to congressional consideration the broad policy questions underlying the desirability of regulating the minimum age for compensated involuntary retirement. Factors such as the population's gradually increasing average age and the proper methods of insuring the stability of the Social Security Plan may argue for an even higher retirement age. On the other hand, unemployment prevalent among younger members of society and a developing trend to distribute available employment by the use of a four day work week pull in the opposite direction. Further, the enactment of the Pension Reform Act of 1974 may be an important factor, concerned as it is with the financial stability of retirement plans and transfer of benefits.
>
> The fact that the legislation requires the Secretary to study involuntary retirement and submit legislative recommendations to the President and Congress shows recognition of the problem by the legislature. It chose to await further data before deciding what, if any, further action is warranted. Legislation need not address itself to all the problems in any given area at one time. Particularly when the effects of a policy are not susceptible to accurate prediction. Congress may well decide that prudence dictates a tentative, experimental approach. It is not the function of the courts to accelerate that process when Congress unquestionably is acting within its proper scope."



In short, as the Third Circuit noted, policy considerations of the nature expressed by Respondent are properly directed to the legislature, not the courts. Even McMann in his brief (p. 16) recognizes that: "Congress is the branch of government which is institutionally designed to identify and weigh various social values", citing *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 109-110 (1949). Accordingly, the Respondent's "policy consideration" arguments are not properly addressed to this Court, whose function it is to interpret the law as written.

## II.

### McMANN'S ARGUMENT THAT SECTION 4(f)(2) OF THE ACT DOES NOT HAVE A "PLAIN MEANING" AND IT SHOULD THEREFORE BE CONSIDERED IN LIGHT OF ITS PURPOSE.

McMann argues at pages 14-18 of his brief that Section 4(f)(2) of the Act does not have a "plain meaning". In support of this contention, he notes that previous court decisions construing Section 4(f)(2) have differed in results reached. Citing the dissent in *Brennan* v. *Taft Broadcasting Company*, 500 F. 2d 212, 220 (5th Cir. 1974), the decision in *Zinger* v. *Blanchette*,

*supra*, as well as the decision of the 4th Circuit in *McMann*, he concludes that "[T]he examination of these three opinions can lead to only one conclusion: that Section 4(f)(2) has no 'plain meaning' ". McMann then asserts that since Section 4(f)(2) has no plain meaning, it should ". . . be construed in light of its purposes and legislative history." (Resp. br., p. 16.)

The fallacy in Respondent's approach is that he fails to recognize that none of the three courts has concluded that Section 4(f)(2) is ambiguous or does not have the plain meaning described by its wording. The Fourth Circuit, in *Taft*, referring to Section 4(f)(2), stated that (500 F. 2d 212, 215):

> "Its language is plain: 'a bona fide *employee benefit plan such as* a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. The key phrase is 'employee benefit plan'. The words, 'retirement, pension, or insurance', are added in a clearly descriptive sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any."

At 500 F. 2d 217, the *Taft* majority also referred to the "unambiguous language of the statute", clearly refuting any indication that it thought the language unclear in any way.

In *Zinger, supra*, the Third Circuit did not hold or state that the language of Section 4(f)(2) was ambiguous or that its meaning was not clear. The Third Circuit's concern was with the question of whether the retirement program of Penn Central met the plain requirements of Section 4(f)(2). It concluded that it did—that the plan was concededly *bona fide* and the pension not so unreasonable as to brand the plan a subterfuge to evade the purpose of the Age Discrimination in Employment Act (the "Act").

And in *McMann*, the Fourth Circuit did not rule that the language of Section 4(f)(2) was in any manner ambiguous or unclear. To the contrary, the Fourth Circuit expressly stated that (542 F. 2d 217, 220):



> "We believe the language of the statute is clear, but that the *Brennan* court's interpretation of it is erroneous."

In reality, the language of Section 4(f)(2) is plain on its face. Each word used in Section 4(f)(2) is identifiable and has a specific, intelligible meaning. Those courts which have construed Section 4(f)(2) in the past have not had difficulty accepting the proposition that the language of Section 4(f)(2) is clear and unambiguous. Rather, the courts have faced difficulty in applying the *test* of Section 4(f)(2) to the facts of the various cases—in determining, for example, whether a particular benefit plan is *bona fide* or not, whether a plan is a subterfuge to evade the purposes of the Act or not. In sum, the language of Section 4(f)(2) is plain and clear. Its application to fact situations is the area in which disagreements have arisen.

## III.

## McMANN'S ARGUMENT THAT THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT.

In part III of his brief, Respondent McMann argues that the decision of the Fourth Circuit in this case is consistent with the legislative history of the Act and with the intent of Congress. To support this proposition, McMann points, *inter alia*, to the joint House-Senate report on the bill with reference to the provision that became Section 4(f)(2). In part, that report states:

> "It is important to note that exception (3) [later enacted as Section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vital to the legislation, and was favorably received by witnesses at the hearings."

McMann then recites certain excerpts from the transcript of hearings before the Subcommittees on Labor in the Senate and House in which various Senators and Representatives agreed that the exception in Section 4(f)(2) serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting their employment without necessarily including such workers in employment benefit plans.

McMann, however, completely ignores other parts of the legislative history which demonstrate beyond question that Congress purposefully intended to *include* involuntary retirements within the Section 4(f)(2) exemption in *addition* to the right accorded employers to exclude older workers from participation in benefit plans to facilitate their hire.

It should be noted in this connection that McMann concedes on page 22 of his brief that involuntary retirements are not prohibited by the Act. He states:

> "It should be pointed out that no party to this case has argued, nor did the court below hold, that all involuntary retirement is prohibited by the Act."

In conceding that not all involuntary retirements are prohibited by the Act, McMann necessarily admits that the Act permits at least some involuntary retirements. This permission in the Act presumably appears in Section 4(f)(2), since it does not appear elsewhere in the Act. This being the case, McMann must concede that Section 4(f)(2) of the Act permits an involuntary retirement when made pursuant to a *bona fide* retirement plan which is not a subterfuge to evade the purposes of the Act. Such being the fact, it is idle for McMann to quote the Committee's reports and Congressmen's speeches as though the *sole* purpose of Section 4(f)(2) was to permit employers to exclude older applicants from benefit plans in order to facilitate their hire. Assuredly, the latter purpose is *one* purpose of Section 4(f)(2), and perhaps the prime purpose, but as the legislative history clearly shows, it is by no means the *sole* purpose.



McMann omits mention of that important part of legislative history which establishes that involuntary retirements are also included within the Section 4(f)(2) exception. Briefly summarized, the legislative history shows that on January 23, 1967, the President recommended legislation covering employees from ages 45 to 64 which "provided an exception for special situations . . . where the employee is separated under a regular retirement system." (113 Cong. Rec. pp. 1089-1090.) The Presidential backed bills introduced into the House and Senate specifically provided that it would not be unlawful to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. Senator Javits of New York, whose home state already had a similar exception permitting involuntary retirements in accordance with established pension plans, did not disagree with this proposal as far as it went, but stated it did not go far enough as an exemption. He stated he was concerned about the operation of established pension plans as a potential impediment to the hiring of older workers and hence proposed a *broadening* of the exemption. In part he said, "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem." (Hearings on S. 830 before Subcommittee on Labor at pp. 27-28, 1967.) He then proposed that "a fairly broad exemption be provided for *bona fide* retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." (*Id.*, pp. 27-28.) The "fairly broad exemption" referred to by Senator Javits later became the existing Section 4(f)(2). Clearly, it retained the "involuntary retirement" feature of the Administration's bill.

The Department of Labor had been involved in the development of the Act as early as June, 1965, when the Secretary of Labor, under mandate of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-15, reported to Congress on the problem

of age discrimination (111 Cong. Rec. 1296, 1965). In the following year, pursuant to Section 606 of the 1966 amendments to the Fair Labor Standards Act (§ 606, 80 Stat. 845), the Secretary was directed to develop specific legislative proposals "for implementing the conclusions and recommendations contained in his report on age discrimination" as required by Title VII. The Administration's bill (S. 830, 90th Cong., 1st Sess., 1967) and the Presidential message explaining that bill thus reflected over two years of study by the Department of Labor on the age discrimination problem and, as noted above, that bill plainly authorized involuntary retirement prior to age 65 under a retirement policy which was not a subterfuge to evade the purposes of the Act.

In both the House and Senate hearings, Secretary of Labor Wirtz was the lead witness. His remarks during the hearings indicated the Department of Labor's authorship of the bills (Senate hearings at pp. 36-55; House hearings at pp. 6-42).[1] When Secretary Wirtz was asked about the effect of the proposed legislation on existing pension plans, he stated that it was his judgment that the effect of the provision in 4(f)(2) was to "protect retirement plans" (Senate hearings at p. 53). Obviously, the Department of Labor, speaking through Secretary Wirtz, did not consider that the Act barred involuntary retirements; rather, he considered that Section 4(f)(2) protected the provisions of the plans as they existed.

Although the present form of Sec. 4(f)(2) differs slightly from its original form in the Senate and House bills, the difference is not significant. In commenting on the amendments which incorporate the present language of the Act, Secretary of Labor Wirtz, testifying before the House committee, stated:

> "In the bill reported out by the subcommittee in the Senate there is a change in the language which refers to this point

1. Hearings on S. 830 and S. 788 before Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 36 (1967) and Hearings on H. R. 3651, 3768 and 4221 before Gen. Subcomm. on Labor of House Comm. on Educ. and Labor, 90th Cong., 1st Sess. 6 (1967).



> which you raised earlier, the relationship of this to established pension plans. We count that change as not going to the substance and involving matters going to clarification which would present no problem." (Hearings on H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 40.)

Of especial significance is the fact that organized labor perceived the Act as one which permitted involuntary retirements regardless of age and proposed amendments to outlaw such retirements. (See footnote 14 of United's initial brief.) These amendments were not adopted. The action of Congress in rejecting the amendments is clear evidence that Congress did not intend to bar involuntary retirements pursuant to *bona fide* benefit plans which were not subterfuges to evade the purposes of the Act.

In his brief, McMann omitted all reference to the legislative history described above. That legislative history conclusively shows, however, that Section 4(f)(2) covers more than the exemption of older workers from participation in benefit plans to facilitate their hire; it also permits employers, *inter alia,* to involuntarily retire employees at any age pursuant to a *bona fide* plan which is not a subterfuge to evade the purposes of the Act.

## IV.

## McMANN'S ARGUMENT THAT THE DECISION BELOW PROPERLY REFLECTS THE ASSIGNMENT OF THE BURDEN OF PROOF UNDER THE STATUTE TO THE EMPLOYER.

In its decision below, the Fourth Circuit stated in part that (Appendix, pp. 37, 38):

> "At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the *Brennan* Court's conclusion that any action required by a plan predating the Act is valid, since such a plan could never be a subterfuge. While

> we have already pointed out the fallacy in this reasoning, it is also refuted by the legislative history. The [Committee] report states that the exemption 'applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans.' It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans *differently*, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the *maintenance* of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being maintained as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail. United has offered no justification for maintaining its early retirement provision after the Act became effective [footnote omitted]."

First, United takes issue with the assertion of the Fourth Circuit, above, repeated by McMann in his brief (p. 6), that at oral argument United conceded its plan, if adopted now, would probably violate the Act. The alleged concession occurred in response to a hypothetical question from Judge Craven concerning the legality of United's plan if it had been adopted after the Act and it required retirement at age 55. Rather than conceding that such a plan would have been unlawful, counsel simply stated that "we would have certainly a clear burden of showing that in the adoption of such a plan it would not be a subterfuge to avoid the purposes of the Act."[2] As United set

2. Transcript of tape of oral argument at p. 40. The complete colloquy with Judge Craven was as follows:

> "JUDGE CRAVEN: Mr. Rafferty, let me ask you a sort of hypothetical question: Assume that United has never had any retirement pension or insurance plan or bona fide employee benefit plan, they just never had one, can United adopt one today that provides for everyone to be—to quit work at age fifty-five and this comes under F2 and is perfectly all right?
>
> MR. RAFFERTY: Well, then I think we would have certainly a clear burden of showing that in the adoption of such a plan

(Footnote continued on next page.)



forth in its initial brief (p. 28), and as it contended before, this was not its burden in the instant case because its plan was adopted prior to the Act. Moreover, it is apparent from the colloquy that the discussion was as much concerned with the legality of an age 55 retirement provision as with the timing of the plan's enactment.

Additionally, United is of the view that the significance of the Committee report was misapprehended by the Fourth Circuit. The Committee's report simply stated that the *exemption* of Section 4(f)(2) applies to both new and existing plans and to both the establishment and maintenance of such plans. United reads this report to mean that regardless of whether a plan pre-dates or post-dates the Act, the exemption is available to the employer. Stated otherwise, an employer is permitted under the Committee report to utilize the exemption irrespective of the date of the plan as long as the conditions contained in the exemption are met. As applied to retirement plans, this means that an employer may involuntarily retire an employee under the terms of an existing plan or a new plan as long as the plan is *bona fide* and is not a subterfuge to evade the purposes of the Act.

(Footnote continued from preceding page.)

> it would not be a subterfuge to avoid the purposes of the act and were we able to do that—
>
> JUDGE CRAVEN: What facts would you have to show that it's not a subterfuge, you're adopting it today, you've never had a plan before, you adopt it today and everybody is going to quit at age fifty-five, it's mandatory too.
>
> MR. RAFFERTY: I'm rather hard pressed to answer, Your Honor, other than to point out that by mutual contributions the plan would be in fact more favorable than unfavorable to the individual employee to retire at age fifty-five or whatever the new act would provide.
>
> JUDGE HAYNESWORTH: Well, . . . in that situation only way that fact could possibly survive . . . relationship of . . . age fifty-five, it seems to me that it would be perfectly all right based on baseball players and basketball players and a few people like that.
>
> JUDGE CRAVEN: Boxers, age thirty perhaps."

In the case at hand, United took the position before the Fourth Circuit that since its plan was concededly *bona fide* and it pre-dated the Act by some twenty-six years, it obviously could not be a subterfuge to evade the purposes of the Act, which did not then exist. This is not to concede, however, that if the plan were inaugurated post-Act it would be presumed a "subterfuge" to evade the purposes of the Act. A post-Act plan which provides substantial benefits, for example, would not, in United's view, be barred by the Act. See *Zinger, supra.*

In the last part of the quotation, the Fourth Circuit asserted that United, to avail itself of the exemption, would have to demonstrate that its plan, in addition to having a benign establishment, was not being "maintained" as a subterfuge to evade the Act and that United offered no justification for maintaining its early retirement provision after the Act became effective. The fact is that United maintained its entire retirement package as it existed before the Act became effective since the language of Section 4(f)(2) authorized it "to observe the terms" of that plan. To repeat the testimony of Secretary Wirtz:

> ". . . the effect of Section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans."

As *amicus* Chamber of Commerce noted in its brief in support of United's Petition for a Writ of Certiorari in this case (p. 10), numerous provisions of employee benefit plans differentiate on the basis of age in addition to specifying retirement dates, such as in vesting provisions, benefit payment formulas, funding provisions and premium payments for insurance and health plans. The reasoning of the Fourth Circuit, if applied to retirement dates of pension plans, could be applied with equal force to *all* age-related benefit plans in *all*



aspects, including those mentioned above. Yet, such changes are clearly the very thing Congress intended to avoid by the Section 4(f)(2) exemption.

Further, the Fourth Circuit improperly imposed the burden of proving a negative on United—*i.e.*, a requirement that United prove its plan was *not* being maintained as a subterfuge to evade the purposes of the Act. For the reasons set forth at length in the *amicus* Chamber of Commerce's brief (pp. 7-9) the imposition of this burden on United was wrongful.

## V.

## McMANN'S ARGUMENT THAT THE CURRENT POSITION OF THE SECRETARY OF LABOR IS COMPATIBLE WITH THE INTERPRETATIVE BULLETINS ISSUED BY THE DEPARTMENT OF LABOR.

On pages 26-30 of his brief, McMann argues that the current position of the Secretary of Labor is compatible with the Interpretative Bulletin issued by the Department of Labor. In support of this argument, McMann asserts that the Interpretative Bulletin was issued immediately after the effective date of the Act and that such "time limitations are not conducive to thoroughness in the consideration of the regulations (Resp. br., p. 30), that the interpretation "is not a regulation with the force of law" (Resp. br., p. 27), and that there is "no conflict" between that section of the Interpretative Bulletin (§ 860.110) dealing with involuntary retirements and the current position of the Secretary (Resp. br., p. 28).

In response to the first point, and as United noted earlier in this reply brief, the Secretary of Labor was intimately involved in the preparation of the Administration's age bill for some two years prior to passage of the Act. Secretary of Labor Wirtz was the lead witness in the Committee hearings and assuredly was fully knowledgeable concerning the intent of Congress in adopting the Administration's bill. For McMann to ascribe to the Department of Labor a lack of thoroughness

in preparation of the Interpretative Bulletin because of the relatively short time involved between passage of the Act and the date the interpretations were issued is to ignore the long period of Labor Department involvement with the Act prior to its passage.

Moreover, because Secretary Wirtz was intimately familiar with the Act from its inception, Secretary Wirtz was in position to specify immediately what the Act meant and how it was intended to apply when enacted into law. The Interpretative Bulletin issued contemporaneously with the Act, thus, represents the views of the Department as to the intent of the Act at a time when that intent was fresh in mind. This is the very type of agency expertise which this Court indicated is entitled to "great deference" in *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971) and other cases.

McMann, in his brief, endeavors to downgrade the authority of the Interpretative Bulletin further not only by suggesting it was not thoroughly considered because of the alleged short time involved in its preparation, but also by stating that the Interpretative Bulletin ". . . is not a regulation . . . [and was] merely intended to be a practical guideline, and nothing more." (Resp. br., p. 27.) This assertion is contrary to the facts. Section 9 of the Act [29 U. S. C. § 628] authorized the Secretary of Labor to issue "such rules or regulations as he may consider necessary or appropriate" in carrying out the Act. The text of the Interpretative Bulletin was issued under authority of 29 U. S. C. § 621 et seq. (the Act) and other authorities. It was published in the Federal Register on June 21, 1968 (33 F. R. 9172) and codified under Title 29—Labor, Chap. V—Wage and Hour Division, Department of Labor, Subchapter C, as part 860. The Bulletin as issued to the public contained § 860:110 dealing with involuntary retirements prior to age 65 and this provision has remained unchanged to the date of this reply brief. Clearly, the interpretations were issued under authority of the Act and constitute the Secretary's official regulations.



McMann argues that because Section 860.1 of the Interpretative Bulletin provides it is subject to change by reason of court decisions or because the Department of Labor concludes, through its own internal processes, that its interpretation is incomplete or incorrect, subsequent changes are proper. But this reasoning misses the point. The Interpretative Regulations, which were issued contemporaneously with the Act by a Secretary of Labor who was thoroughly familiar with the intent of the Act, indicates best what construction should be placed on that Act. See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142 (1976) on this point. Further, in addition to the Interpretative Regulations, several "Opinion Letters" were issued by the Wage-Hour Administrator supporting the proposition that involuntary retirements among the "protected group" pursuant to *bona fide* pension plans were permissible (See United's initial brief, p. 13).

McMann's argument that the position of the Department of Labor remains consistent is not borne out by the facts. Neither the Interpretative Bulletin nor any of the Wage-Hour Administrator's early opinions ever took the position that before an employer could involuntarily retire an employee under its pension plan, it would be obligated to show that there was a "business" or "economic" justification in order to observe the plan. As the Third Circuit noted in *Zinger, supra* (549 F. 2d at 908):

> "The [Interpretative] bulletin demonstrates the Secretary's [Wirtz] recognition of the difference between retirement with or without a pension; the financial effect of the latter being the same as outright discharge. *Succeeding Secretataries, however, have revised the Department's position.* * * *" (Emphasis added.)

Unmistakably, succeeding Secretaries of Labor have imposed conditions on the involuntary retirement of employees which were not present in the earlier interpretations of the Act by Secretary Wirtz and which do represent a substantive departure from the original interpretation.

## VI.

**McMANN'S ARGUMENT THAT UNITED'S PILOTS PENSION PLAN, BY ITS TERMS, DOES NOT MANDATE RETIREMENT AT AGE 60, AND THEREFORE CANNOT BE WITHIN THE EXCEPTION OF SECTION 4(f)(2).**

In part VI of his brief, McMann indicates that since the pilots' pension plan, of which he was a member, does not define the words "normal retirement", and neither McMann nor his union had any control over the insertion of this language in the plan, those words should be construed as meaning other than mandatory retirement. There are several answers to this assertion.

First, the question of whether "normal retirement" means "mandatory retirement" in the context used at United is a factual question which has been decided by the courts and an arbitration board below and is not a matter in issue before this Court. The pilots' arbitration board, with Professor Archibald Cox participating as Neutral, rejected McMann's argument that "normal" meant "average", pointing out that (Appendix p. 23):

> "The argument is unpersuasive. 'Normal' means regular or standard, not average, not only as a matter of linguistics but also in the general context of retirement and pension plans and the settled practice at United."

The Fourth Circuit, in its decision below, stated (Appendix, p. 33):

> "While the meaning of the word 'normal' in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the 'normal' retirement age. United legally may retatin employees such as McMann past age 60, but has never done so: its policy has been to retire all employes at the 'normal' age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer."



Concerning McMann's allegation that the language of the pension plan calling for "normal retirement" at age 60 was a matter beyond his and his union's control, it will suffice to state that the pension plan is subject to the collective bargaining process and at no time did the pilots' union on United request a change in the age 60 retirement provision, although it had opportunity to do so. Moreover, McMann himself joined the plan knowing the normal retirement age was age 60.

Inasmuch as the factual question of the meaning of "normal retirement" in the context of United's practice has been settled below, no issue remains on this point.

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In its brief *amicus curiae,* the National Retired Teachers Association, *et al.* (hereinafter, the "Association") has advanced three arguments in support of the Fourth Circuit's decision. United will now turn to these arguments.

## VII.

**THE ASSOCIATION'S ARGUMENT THAT FACIALLY THE ACT PROHIBITS THE USE OF AN ARBITRARY AGE CRITERION FOR INVOLUNTARY RETIREMENT BEFORE THE AGE OF 65.**

On pages 4-13 of its brief, the Association takes a completely different view of the Act than does McMann. As noted earlier, McMann stated in his brief (p. 22) that:

> ". . . no party to this case has argued, nor did the court below hold, that all involuntary retirement is prohibited by the Act."

The *amicus* Association, however, does not take the position that involuntary retirement prior to age 65 is permitted under the Act at all. It reads Section 4(f)(2) restrictively as establishing solely the right of employers to grant or withhold benefits and not the right of employers to retire employees involuntarily. As stated in its brief (pp. 11-12):

> "In short, the only possible interpretation of the benefit plan provision which harmonizes the language of the Act is that it refers only to the granting or withholding of fringe benefits and not to personnel actions affecting the existence or non-existence of employment before the age of 65."

The Association's position rests on its theory that the employee benefit provision is not, by its terms an "exception" to the Section 4(a) prohibition against age discrimination (Assoc. br., p. 6). In short, the Association takes the position that the only way to reconcile Section 4(f)(2) with the purposes of the Act (as set forth in Section 2 thereof) is to disregard any interpretation of Section 4(f)(2) which would permit involuntary retirements.

The Association fails to recognize, however, that Section 4(f)(2) cannot realistically be read as restrictively as the Association would wish. The preamble of Section 4(f) says "It shall not be unlawful" for the employer to take the actions described in Subsections 4(f)(1), (2) and (3). Subsection 4(f)(2) states in essence that it is permissible for an employer to observe the terms of a seniority system or *bona fide* benefit plan which is not a subterfuge to evade the purposes of the Act. To accept the Association's position, one would have to adopt the position that the right of an employer to observe the terms not only of a benefit plan, but of a "seniority" system as well, does not appear in the exception. To do so is to ignore the plain written language of Section 4(f)(2).

The last words of Section 4(f)(2), which provide that no employee benefit plan shall excuse the failure to hire any individual, do not give force to the Association's argument. Unquestionably, as mentioned earlier, *one* of the purposes of Section 4(f)(2) is to encourage the hiring of older workers by excusing their participation in certain benefit plans. But, contrary to the Association's theory, that is not the *only* purpose of Section 4(f)(2). Another purpose of Section 4(f)(2) is to permit involuntary retirements when the criteria of Section 4(f)(2) are met.



The Association's position that Section 4(f)(2) forbids involuntary retirement is not only contrary to the position asserted by McMann in his brief, but is also contrary to the position taken by the Secretary of Labor in his Interpretative Bulletin, to the Secretary of Labor's position before the Fourth Circuit in the case at hand and in other cases, to all Court decisions on the matter, and to Section 5 of the Act itself (29 U. S. C. § 624), which directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement and report his findings and appropriate legislative recommendations to the President and to Congress.

In footnote 5 of its brief (p. 12), the Association attempts to dismiss the relevance of Section 5 to this case by asserting, with reference to the *Zinger* decision, that "it could be just as easily posited that the Act forbade involuntary retirement before the age of 65 and that Congress desired further data to determine if involuntary retirement at a later date should likewise be prohibited." This theory is untenable. Had Congress intended the Section 5 study to address only involuntary retirement after age 65, there would have been no need to provide, as Congress did in Section 3(b) of the Act (29 U. S. C. § 622(b)), that the Secretary submit a separate report on the advisability of the age 65 limit provided by the Act. Further, the Secretary of Labor's own interpretation of Section 5 recognizes that it applies to pre-age 65 retirements. In this connection, reference to Section 5 appears in the Interpretative Bulletin under the title "Involuntary Retirement Before Age 65". (See 29 C. F. R. § 860.110(b), published originally in 1968.)

In sum, the Association's theory that Section 4(f)(2) prohibits involuntary retirements is contrary to the Act itself and to all authorities which have interpreted the Act.

## VIII.

**THE ASSOCIATION'S ARGUMENT THAT THE LEGISLATIVE HISTORY CONCLUSIVELY PROVES THAT THE BENEFIT PLAN PROVISION WAS NEVER INTENDED TO PERMIT INVOLUNTARY RETIREMENT BEFORE THE AGE OF 65.**

Carrying forward its theme that Section 4(f)(2) was not intended to permit involuntary retirements at all, the Association argues on pp. 13-21 of its brief that if Section 4(f)(2) admits of a contrary interpretation, then legislative history supports the view that involuntary retirements are prohibited.

The essence of the Association's argument is that Congress, in the final days of the Congressional session leading to a vote on the bill, referred to Section 4(f)(2) in the context of relieving the employer of the need to accommodate older applicants in benefit plans in order to facilitate their hire and "repudiated" the early "involuntary retirement" purpose of Section 4(f)(2). At the end of footnote 6 (Assoc. br., p. 17), the Association says with respect to Senator Javits that:

> "It is clear that the Senator, in his subsequent statements [*i.e.*, statements late in the session] intended to expressly repudiate any initial approval of the involuntary retirement feature of the Administration's bill."

The fact is that Senator Javits did not make any "subsequent statements" repudiating initial approval of the involuntary retirement feature of the Administration's bill. What actually transpired is that the involuntary retirement aspect of Section 4(f)(2) had been agreed upon and no longer required dialogue in Congress (See the legislative history cited hereinabove and in United's initial brief). Senator Javits' concern was that the exception did not go far enough, that it met "only part of the problem", and, therefore, should be "broadened" to include the exemption of older workers from existing benefit plans in order to facilitate their employment. Thereafter, the dialogue concerned the added, or broadened, aspect of Section 4(f)(2).



At no time, however, did Senator Javits "repudiate" his, or Congress', earlier approval of the involuntary retirement feature of Section 4(f)(2).

## IX.

**THE ASSOCIATION'S ARGUMENT THAT "DECISIONS OF LOWER COURTS INCONSISTENT WITH THAT OF THE COURT BELOW WERE BASED UPON THE UNCRITICAL ACCEPTANCE OF AN ERRONEOUS INTERPRETATIVE REGULATION OF THE SECRETARY OF LABOR OR WERE THE RESULT OF FAULTY ANALYSIS".**

Earlier in this brief, United noted that McMann, in his brief, stated that the earlier Interpretative Bulletin issued by the Secretary of Labor and the current position of the Secretary of Labor were "compatible". The *amicus* Association does not agree. On page 23 of its brief, the Association asserts that "That interpretative regulation does not reflect the present thinking of the Secretary . . . as evidenced by the support given to the Respondent in the lower court and this Court, and by earlier Labor Department suits raising the same issue."

In substance, the Association endeavors to explain away decisions adverse to the plaintiffs in prior age discrimination cases, such as *Steiner* v. *National League*, 377 F. Supp. 945 (C. D. Cal. 1974), *aff'd without opinion*, No. 74-2604 (9th Cir. 1975) and *McKinley* v. *Bendix Corp.*, 420 F. Supp. 1001 (W. D. Mo. 1976) on the basis that these courts were misled by the initial Interpretative Bulletin. With respect to three other cases, which examined the question of whether Section 4(f)(2) could ever justify involuntary retirement before age 65; *i.e. Taft, supra, Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Hawaii 1976), and *Zinger, supra*, the Association concludes that these courts were wrong because they analyzed the Act incorrectly.

With respect to *Taft*, the Association argues that it was incorrect for the Fifth Circuit to rule that the language of Section

4(f)(2) is plain, and at the same time reject the notion that an employer must rehire an employee it retired. However, the Association's argument that *Taft* was decided erroneously is based upon its own assumption, described earlier, that the language of Section 4(f)(2) permits of no involuntary retirement prior to age 65 and has for its sole purpose the employment of older workers. Thus, the Association cannot reconcile the *Taft* court's decision with its own position. As United pointed out earlier, Section 4(f)(2) has more than one purpose. It permits involuntary retirements which meet the conditions of Section 4(f)(2). It also permits the withholding of benefits from older workers in order to facilitate their hire. The Association's disagreement with *Taft* is grounded in its predetermination that Section 4(f)(2) authorizes only the latter exception.

With respect to *Dunlop, supra,* the Association notes its disagreement with the result reached in that case by explaining that the *Dunlop* court overlooked the most "obvious" meaning of Section 4(f)(2); *i.e.*, the meaning that "a newly hired worker may not be excluded from fringe benefits pursuant to the literal terms of a plan if the employer would not thereby be required to assume a disproportionately greater economic burden." Again, the Association's disagreement with *Dunlop* lies in its assumption that Section 4(f)(2) permits no involuntary retirements, an assumption unsupported by the facts.

The Association's disagreement with *Zinger* is twofold: First, it does not agree that involuntary retirements with substantial benefits, as contrasted to discharges or retirements without substantial benefits, were looked upon with favor and, second, it disagrees that the legislative history shows that involuntary retirements were intended to be part of Section 4(f)(2). According to the Association, Section 4(a) prohibits involuntary retirements and the distinction between discharges and involuntary resignations found by the *Zinger* court is erroneous. Also, according to the Association, the *Zinger* court failed to note that Senator Javits had expressly disavowed his initial approval of the involuntary retirement feature of Section 4(f)(2).



As noted earlier, however, Senator Javits did not disavow his approval of the involuntary retirement feature of Section 4(f)(2). Further, the *Zinger* court comprehensively traced the legislative history and correctly arrived at the conclusion that discharges were looked upon with disfavor, but that involuntary retirements were permitted by the Act as long as they were made pursuant to a *bona fide* benefit plan which was not a subterfuge to evade the purposes of the Act; *i.e.*, a benefit plan which paid reasonable benefits. Finally, the Act itself shows that discharges on the basis of age alone are impermissible, whereas the observance of the terms of *bona fide* benefit plans is permissible. Thus, the distinction between discharges and involuntary retirements made pursuant to *bona fide* pension plans paying reasonable benefits is a proper distinction.

## CONCLUSION.

For the reasons set forth in this reply brief, the arguments advanced by McMann and the *amicus* Association in support of the Fourth Circuit's decision are in error.

United respectfully urges this Court to reverse the decision of the Fourth Circuit below, and affirm the judgment of the District Court in this case.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-906**

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UNITED AIR LINES, INC., *Petitioner,*

v.

HARRIS S. MCMANN, *Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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### INTEREST OF THE AMICUS [1]

The Chamber of Commerce of the United States of America (hereinafter "the Chamber") is a federation consisting of a membership of over 3,600 state and local chambers of commerce and professional and trade associations and a direct business membership in excess of 60,100. It is the largest association of business and professional organizations in the United States.

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[1] Consents of the parties to the filing of this brief have been obtained, and letters reflecting such consents are on file in the Office of the Clerk.

In order to represent its members' views on questions vitally important to their interests and to render such assistance as it can to this Court's deliberations, the Chamber has frequently participated as *amicus curiae* in a wide range of significant fair employment matters before this Court.[2]

The issue in this case, whether employees may be retired involuntarily pursuant to bona fide retirement plans, is of major interest to the Chamber's membership. The amount of money invested by the Chamber's members in pension plans and retirement systems is enormous. The apparent effect of the decision below is to outlaw involuntary retirements prior to age 65, even in cases where substantial pension benefits are provided. This result would adversely affect many of the Chamber's members whose plans contain provisions authorizing or directing such pre-age 65 retirements. Moreover, that decision would deny all employers the option to provide for involuntary retirement below 65 years, however substantial the benefits received by the employees.

These issues were also of great importance to the Chamber's members in 1967 when Congress was considering the legislation which is interpreted by the court below. As a result, the Chamber testified before both the Senate and House subcommittees.[3] The Chamber and others expressed their concern to both subcommittees for the potential impact this legislation could have on the operation of employee benefit plans. As a result, Congress explicitly provided that age-related terms, including involuntary retirement provisions, in pension, retirement, health, and insurance plans would not be invalidated by the statute.

For these reasons, the Chamber filed an *amicus* brief urging this Court to grant *certiorari* in the instant case, and now submits this brief in support of petitioner's contention that the decision below should be reversed.

[2] *E.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

[3] Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 90th Cong., 1st Sess. 105-44 (1967) ("Senate Hearings"); Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education & Labor, 90th Cong., 1st Sess. 60-76 (1967) ("House Hearings").



## QUESTION PRESENTED

Whether the court below erred in holding that, absent an independent economic or business purpose, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1970) (hereinafter "the ADEA" or "the Act"), prohibits involuntary retirement of employees prior to age 65, even where substantial retirement benefits are provided and notwithstanding the terms of Section 4(f)(2) of the Act, 29 U.S.C. § 623 (f)(2) (1970).

## STATEMENT OF THE CASE

The respondent, an employee of petitioner, United Air Lines, Inc., was terminated when he reached age 60 under an employee retirement plan which required all covered employees to retire at that age. Respondent filed an action claiming that his forced retirement violated the ADEA. The district court granted summary

judgment for the petitioner because it considered the petitioner's action to be authorized under Section 4(f)(2) of the ADEA, which states that "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of [the Act]." 29 U.S.C. § 623(f)(2) (1970) (hereinafter "Section 4(f)(2)").

On appeal, the Fourth Circuit reversed the district court.[4] Though conceding that the United plan was "bona fide in the sense that it exists and pays benefits,"[5] the court of appeals rejected the district court's conclusion that the plan was not a subterfuge. It held that the Section 4(f)(2) exemption is available only if the employer can prove that there is no evasion of the *purposes* of the Act, that one of the principal purposes of the Act was to prohibit arbitrary age discrimination, and, therefore, that a mandatory early retirement provision "must have some economic or business purpose" independent of age if it is not to be considered a subterfuge.[6]

## INTRODUCTION AND SUMMARY

The court below is alone in concluding that the ADEA generally prohibits involuntary retirements before age 65 pursuant to a pension program. All other federal courts which have considered the question have reached directly contrary results: the Third Circuit in *Zinger* v. *Blanchette*, 14 Fair Empl. Prac. Cas. 497 (1977); the Fifth Circuit in *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (1974); the Second Circuit in *de Loraine* v. *MEBA Pension Trust*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); and the district courts in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C.D. Cal. 1974), *aff'd without opinion*, No. 74-2604 (9th Cir. Oct. 15, 1975); *Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Hawaii 1976), *appeal docketed sub nom. Usery* v. *Hawaiian Telephone Co.*, No. 76-2874 (9th Cir. Aug. 26, 1976) and *Dunlop* v. *General Telephone Co. of California*, 13 Fair Empl. Prac. Cas. 1210 (C.D. Cal. 1976), *appeal docketed sub nom. Usery* v. *General Telephone Co. of California*, No. 76-2371 (9th Cir. June 25, 1976). Each of these decisions held that an employee benefit plan providing involuntary retirement before age 65 was lawful by virtue of the Section 4(f)(2) exemption.

[4] McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976).

[5] *Id.* at 219.

[6] *Id.* at 221.



The courts in *Zinger* and *Hawaiian Telephone*, like the court below, held that whether a plan was adopted before or after the enactment of the ADEA was immaterial to the availability of the Section 4(f)(2) defense. In *Taft Broadcasting* the Fifth Circuit had held that the fact the profit sharing plan at issue had been adopted prior to the passage of the ADEA conclusively established that the plan was not a subterfuge to evade the purposes of the Act.[7]

The Chamber agrees with the Fourth Circuit, the Third Circuit, and the *Hawaiian Telephone* district court that Section 4(f)(2) should not be construed as

[7] 500 F.2d at 215. The Second Circuit in *de Loraine* relied both on the fact that a pension trust was adopted before the ADEA and that it "pays substantial benefits to a broad class of workers" in concluding that "the trust itself is certainly not a subterfuge to evade the purposes of the statute." 499 F.2d at 50.

treating plans adopted prior to the Act differently from those adopted afterwards.[8] It submits, however, that the proper standard for determining whether a plan is a subterfuge within the meaning of Section 4(f)(2) is that adopted by the Third Circuit in *Zinger* and by the district court in *Hawaiian Telephone* and not that adopted by the Fourth Circuit in this case. In both *Zinger* and *Hawaiian Telephone* the courts rejected the conclusion reached by the Fourth Circuit below and held that involuntary retirements before age 65, whether mandatory or at the employer's option, are lawful under the ADEA where they provide substantial benefits to the retired employees.

The most persuasive analysis of the present question is that contained in the Third Circuit's *Zinger* decision. There the court of appeals refused to follow the Fourth Circuit's interpretation of the ADEA. Its refusal was based on a thorough consideration of (1) the terms of the Act itself, (2) the pertinent legislative history, and (3) the contemporaneous interpretations of the ADEA by the Secretary of Labor. For the same

[8] The ADEA's legislative history puts to rest the notion that the fortuity of the date when a retirement plan was established controls as to its lawfulness under Section 4(f)(2). Both the House and Senate Reports unequivocally state that Section 4(f)(2) applies to "both *new* and *existing* employee benefit plans, and to both the *establishment* and *maintenance* of such plans." H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967); S.Rep. No. 723, 90th Cong., 1st Sess. 4 (1967) (emphasis added). Both the court below, 542 F.2d at 221, and the Third Circuit in *Zinger*, 14 Fair Empl. Prac. Cas. at 499, correctly viewed this explanation as clearly protecting both pre- and post-Act plans that otherwise came within the language of Section 4(f)(2). Moreover, the later enactment of the Employment Retirement Income Security Act ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), which recognizes "normal" retirement ages before 65, further indicates that post-ADEA plans may benefit from the exception. *See* pp. 21-22, *infra*.



reasons found dispositive by the Third Circuit in *Zinger*, the Chamber submits that the decision below should be reversed.

## ARGUMENT

### I. THE DECISION BELOW DISTORTS THE PLAIN MEANING OF THE ADEA

#### A. The Act Permits Involuntary Retirement Prior to Age 65 Under a Bona Fide Retirement Plan

The ADEA's basic mandate is the protection of workers between the ages of 40 and 65 from arbitrary age discrimination in employment. 29 U.S.C. §§ 621 (b), 631. To that end, Section 4(a) of the Act declares it unlawful to discharge, fail to hire, or otherwise discriminate against an individual because of his age. 29 U.S.C. § 623(a). The Act, however, is not unlimited in its scope. In *Zinger* v. *Blanchette*, 14 Fair Empl. Prac. Cas. 497, 500 (3d. Cir. 1977) the Third Circuit, while noting the express prohibition against age discrimination in discharge, recognized: "[N]o statutory provision explicitly prohibits early retirement." Moreover, the only two provisions of the statute which refer to retirement would be rendered meaningless by the interpretation adopted by the court below.

First, Section 4(f)(2) provides:

> It shall not be unlawful for an employer . . . to observe . . . any bona fide employee benefit plan such as a retirement . . . plan which is not a subterfuge to evade the purpose of this [Act], except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

29 U.S.C. § 623(f)(2).

This language is unambiguous in exempting involuntary early retirement under a benefit plan which is "bona fide" and not a "subterfuge." All parties to this litigation agree that United's plan is bona fide within the meaning of Section 4(f)(2).[9] The court below, however, found that, despite its bona fide character, the plan was a "subterfuge to evade the purposes of the Act" because United had shown no "economic or business purpose other than arbitrary age discrimination."[10]

The obvious and compelling response to the Fourth Circuit's position is that the Act does not require, either by Section 4(f)(2) or by any other provision, that a separate economic or business justification be demonstrated in order for a retirement plan to come within the exemption.[11] Indeed, apart from retirement programs, Sections 4(f)(1) and (3) separately exempt adverse action taken against members of the protected age group for economic or business reasons. Section 4(f)(1) explicitly permits age-related actions, including outright discharge without retirement benefits, when age is a "bona fide occupational qualification" or when there are "reasonable factors other than age" motivating the decision. Section 4(f)(3) similarly permits discharge or disciplinary action against an older worker for "good cause." Thus, these

[9] 542 F.2d at 219.

[10] 542 F.2d at 221.

[11] In fact, the court below implicitly acknowledged that "economic justification" could be demonstrated only under extraordinary circumstances. It observed that often it is financially advantageous for an employer to *postpone* employees' retirement under a retirement plan, since a later retirement age brings with it shorter life expectancies of retirees and pre-retirement mortality that decreases the total pay-out required. 542 F.2d at 222 and n.8.



exemptions allow discharge, without the necessity to pay retirement benefits, where the employer can establish the "economic or business purpose" required by the court below. The additional exemption in Section 4(f)(2) has—as its plain words state—a different purpose: to allow involuntary early retirement, under a plan providing benefits, without regard to any showing of business purpose.[12]

The only other provision of the Act which refers to retirement is Section 5, 29 U.S.C. § 624, which directs the Secretary of Labor to study

> institutional and other arrangements giving rise to involuntary retirement, and to report his findings and any appropriate legislative recommendations to the President and the Congress.[13]

If, as the opinion of the court below suggests, the ADEA outlaws all programs providing for involuntary retirement before age 65,[14] the enactment of Section 5 would have imposed a futile responsibility on the Secretary of Labor. The Secretary would have been obligated to make a study concerning an employment practice which Congress would have already prohibited. It is preposterous to suggest that Congress would have declared adherence to involuntary early retirement plans unlawful, and, at the same time,

[12] Section 4(f)(2) also permits employers to consider the age of newly hired workers in the protected age group in determining their ability to participate in employee benefit programs. *See* pp. 15-16, *infra*.

[13] Despite this clear directive, no such report has been made in the ten years since the enactment of the ADEA. *Zinger* v. *Blanchette*, 14 Fair Empl. Prac. Cas. 497, 500 (3d Cir. 1977).

[14] This was the characterization given the decision below by the Third Circuit in *Zinger*, 14 Fair Empl. Prac. Cas. at 500.

required study and legislative recommendations on how best to deal with the existence of such plans.[15]

As elementary rules of statutory construction, sections of a statute should normally be read in a manner that gives each separate provision independent significance,[16] and a statute clear on its face can be interpreted without resort to legislative history.[17] The exemption in Section 4(f)(2) and the instructions to the Secretary in Section 5 are superfluous only under the tortured reading given the Act by the court below. If the ADEA is read as Congress wrote it, it is clear that the ADEA permits involuntary retirement prior to age 65 under a plan that provides substantial pension benefits.

### B. Section 4(f)(2) Assigns the Burden of Proving that a Plan is a Subterfuge to the Plaintiff

The court below also ignored the plain meaning of the statute in its allocation of the burden of proof on

[15] The Third Circuit's recent opinion interpreting Section 4(f)(2) rightly concluded that Section 5 was included in the ADEA to permit the Secretary to propose an amendment to Congress dealing with the area of involuntary early retirement. Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497, 503 (3d Cir. 1977). As the court in *Zinger* observed, the presence of Section 5 evidences Congress's concern with the subject and its decision to "await further data before deciding what, if any, further action is warranted." 14 Fair. Empl. Prac. Cas. at 503.

[16] United States v. Menasche, 348 U.S. 528, 538-39 (1955); Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879). *See also* Walker Mfg. Co. v. Industrial Comm., 27 Wis.2d 669, 135 N.W.2d 307 (1965) (similar state age discrimination statute construed to give each exemption independent meaning).

[17] United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940); Caminetti v. United States, 242 U.S. 470, 485, 490 (1917); Brennan v. Taft Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974).



the question of whether a pension plan is a subterfuge. The Fourth Circuit held that, in order for involuntary retirement prior to age 65 to be considered authorized by Section 4(f)(2), "*an employer must demonstrate* that . . . [its] plan is *not being maintained* as a subterfuge to evade the Act . . . ."[18]

Section 4(f)(2) has separate positive and negative elements, requiring first that the action in question be under a bona fide employee benefit plan, and then that the plan not be a subterfuge to evade the purposes of the Act. Since no party can prove a negative, the Chamber submits that the language of Section 4(f)(2) must be construed to limit the defendant's burden to showing that its action was in accordance with an employee benefit plan that is bona fide, *i.e.* one which actually exists and which pays benefits.[19] Such a showing would establish entitlement to the Section 4(f)(2) defense unless the plaintiff could affirmatively demonstrate that the plan, although bona fide, is a subterfuge which results in a violation of the Act. As the Third Circuit suggests in ***Zinger,*** a plaintiff could make such a showing in those cases where the benefits provided are so insubstantial that the alleged "early retirement" is in effect a prohibited discharge.

In comparable situations under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (1970), this Court has repeatedly held that the burden of proof to show that an asserted defense is a "subterfuge" or "pretext"[20] for employ-

[18] 542 F.2d at 221 (emphasis added).

[19] *See* the decision below, 542 F.2d at 219. *Cf.* Brennan v. Taft, Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974).

[20] The Court's recent opinion in General Electric Co. v. Gilbert,

ment discrimination is properly allocated to the plaintiff.[21] The Chamber submits that the same allocation of the burden of proof is appropriate under the ADEA.

## II. THE DECISION BELOW IGNORES THE LEGISLATIVE HISTORY OF THE ADEA, WHICH EVIDENCES A CLEAR CONGRESSIONAL INTENT TO ALLOW INVOLUNTARY EARLY RETIREMENT UNDER A PLAN PAYING SUBSTANTIAL BENEFITS

Contrary to the view of the court below, the legislative history of the ADEA supports rather than contradicts the plain meaning of the Act. In enacting the ADEA, it was Congress's primary concern to promote the employment opportunities of older workers. How-

97 S.Ct. 401 (1976), makes clear that in employment discrimination cases the words "subterfuge" and "pretext" are synonymous.

[21] For example, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court described the order of proof where an employer sought to utilize the exemption in Section 703(h) to defend its use of a personnel test which had a discriminatory effect on minority applicants. That exemption applies to actions based upon the results of a professionally developed ability test, provided that such test or action based thereon "is not designed, intended or used to discriminate because of race. . . ." 42 U.S.C. § 2000e-2(h) (1970). In the Court's view, employers have the burden of establishing through professional validation studies whether their employment tests are job-related. 422 U.S. at 430-31. However, if an employer meets this burden, "it remains to the complaining party to show that other tests . . . without a similarly undesirable racial effect would also serve the employer's legitimate interest. . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.* at 425. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), where the Court also placed the burden on the complaining party to show that the employer's justification for a challenged practice was a pretext for discrimination; that case was cited as authority for the above quoted statements in *Albemarle Paper*.



ever, as the court of appeals in *Zinger* v. *Blanchette* noted, Congress "continued to regard retirement plans favorably"[22] and made every effort to minimize the effect of the new Act on pension programs. Thus, Congress included Section 4(f)(2) expressly to exempt age-related provisions in employee benefit plans. The view of the court below that the legislative history of the Act supports a contrary conclusion ignores the dominant thrust of the legislative record and conflicts with the considered judgment of every other court that has reviewed the legislative history of Section 4(f)(2).[23]

President Johnson's January 23, 1967 message to Congress on "Older Americans," in which he urged passage of a law barring arbitrary age discrimination, specifically recommended that such a law "provide an exception where . . . [an] employee is separated under a regular retirement system."[24] Thus, Section 4(f)(2) in the Administration's original bill stated: "It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. . . ."[25] The

[22] 14 Fair Empl. Prac. Cas. at 500.

[23] *See* Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497, 500 (3d Cir. 1977); Dunlop v. Hawaiian Telephone Co., 415 F.Supp. 330 n. 1 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Telephone Co., No. 76-2874 (9th Cir. Aug. 26, 1976); Dunlop v. General Telephone Co. of Cal., 13 Fair Empl. Prac. Cas. 1210, 1212 (C.D. Cal. 1976), *appeal docketed sub nom.* Usery v. General Telephone Co. of Cal., No. 76-2371 (9th Cir. June 25, 1976).

[24] 113 Cong. Rec. 1087, 1089-90 (1967).

[25] S. 830, 90th Cong., 1st Sess. § 4(f)(2)(1967).

meaning of that section was plainly that involuntary retirement under a retirement plan normally would not be considered illegal age-based discrimination. Secretary of Labor Wirtz, responding to an inquiry during the Senate hearings on the bill, explained how the section would affect private pension and insurance plans: "[T]he effect of . . . Section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about. . . . *It is intended to protect retirement plans.*" [26]

The subsequent legislative history confirms that this original purpose of Section 4(f)(2) was reflected in the final enactment. The final version of Section 4(f)(2) is the result of an amendment to the Administration bill proposed by Senator Javits. This amendment served several purposes, but each was concerned with expanding or clarifying the Section 4(f)(2) exemption for involuntary retirement, not with eliminating it.

First, Senator Javits recognized that the Administration bill's original language—"involuntary separation under a retirement plan" "[met] only part of the problem." [27] He proposed that the section be expanded in two ways to accomplish better the Administration's

[26] Senate Hearings at 53 (emphasis added). Secretary Wirtz acknowledged in his opening remarks that the exemptions of Section 4(f) were "obviously broad" and further observed that what Section 4(a), the Act's prohibition section, did was to "extend to individuals *in situations not covered by* collective bargaining agreements or established *retirement policies*, a degree of protection—against discrimination on the basis of age—very much like that which has evolved in enlightened private experiences and practices." Senate Hearings at 39, 43 (emphasis added).

[27] 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).



purpose of permitting the continuation of legitimate employee benefit plans affecting older workers. His proposal substituted the phrase "observe the terms of a bona fide . . . retirement plan" for the phrase "involuntary separation" in order to make clear that the bill would also condone "flexibility in the amount of pension benefits payable to older workers." [28] While the statute was designed to increase opportunities for older workers to enter (or re-enter) the work force, this change in the language of Section 4(f)(2) acknowledged the potentially ruinous effects the law would have on employers if they were required to permit all employees to participate in benefit plans without regard to length of service.[29] Senator Javits was especially concerned that these cost considerations would have the effect of discouraging the employment of older workers.[30]

The Javits amendment also inserted additional language expanding Section 4(f)(2) to exempt not only retirement plans, but all bona fide employee benefit plans and seniority systems. This allayed employers' concerns that numerous age-related provisions in benefit plans might be inadvertently proscribed by the Act [31] and similar concerns with respect to seniority

[28] *Id.* Many such plans naturally key pension benefits to years of service or set a maximum age for entry into a plan because of the higher costs associated in coverage of older workers. *See also* Senate Hearings at 316-317 (Statement of American Telephone & Telegraph Co.); 321 (Statement of Association of American Railroads).

[29] Thus, although an employer may not refuse on the basis of age to hire individuals in the protected age group, he need not treat such recently-hired older workers equally with respect to benefits under a retirement plan.

[30] 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

[31] *See* Senate Hearings at 106-07 (Statement of U.S. Chamber of

systems.[32] Finally, since the Javits amendment addressed what were recognized as legitimate employer concerns for the cost of employing older workers, the amendment also added a proviso in keeping with the basic purpose of the Act—"except that no such . . . employee benefit . . . plan shall excuse the failure to hire any individual."[33]

Javits's remarks introducing these modifications plainly indicate that their purpose was to expand and clarify the exemption contained in the Administration bill, not to narrow it.[34] The Senator commented: "[A] fairly broad exemption has been provided for bona fide retirement and seniority systems. As I previously noted, S. 830 contains only a limited exemption

Commerce); 257 (Statement of American Retail Federation); 279-80 (Statement of Charles Manning, pension plan consultant); 296-97 (Joint Statement of the American Life Convention, Health Insurance Association of America, and the Life Insurance Association of America); 315-17 (Statement of American Telephone & Telegraph Co.); 317-20 (Statement of Association of American Railroads); 323 (Statement of National Association of Manufacturers). *See also* House Hearings at 62-63 (Statement of U.S. Chamber of Commerce); 142 (Statement of American Retail Federation); 477-81 (Statement of Association of American Railroads); 483 (Statement of National Association of Manufacturers); 494-96 (Statement of American Telephone & Telegraph Co.); 499 (Joint Statement of American Life Convention, Health Insurance Association of America, and the Life Insurance Association of America).

[32] *See, e.g.,* Senate Hearings at 96 (Statement of AFL-CIO); 317-318 (Statement of Association of American Railroads). *See also* 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

[33] 113 Cong. Rec. 7077 (1967).

[34] I have prepared and will introduce today a series of amendments to the Administration's bill, which I believe will meet those various problems, *while retaining the most desirable features of the Administration's bill,* and of S. 788. 113 Cong. Rec. 7076 (1967) (emphasis added).



for retirement systems and no exemption for seniority systems."[35]

In addition to clear statements of its author, statements by other principal parties to the legislative process show that the Javits amendment retained the exemption for involuntary retirement. Secretary Wirtz acknowledged that the Javits amendment, then pending in the Senate, did not signal a departure from the original meaning of the Administration bill. In testimony at the House hearings the Secretary was questioned with respect to Senator Javits's amendment in the Senate. He responded that the Department of Labor viewed the amendment to Section 4(f)(2) as "not going to the substance [of the Senate bill]" and as a change "going to clarification that would present no problem."[36]

Moreover, as the Third Circuit noted in *Zinger,*[37] representatives of organized labor testified in opposition to Section 4(f)(2), after Senator Javits had proposed his amendment, because "[i]nvoluntary retirement could be forced, regardless of the age of the employee, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act."[38] They were, of course, unsuccessful in their attempt to persuade Congress

[35] 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

[36] House Hearings at 40.

[37] 14 Fair Empl. Prac. Cas. at 501.

[38] Senate Hearings at 96 (Statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO). *See also* House Hearings at 413 (Statement of Kenneth Meiklejohn, Legislative Representative, AFL-CIO).

to eliminate the exemption for involuntary early retirement.

Observations made during final floor consideration of the law in both the House and the Senate confirm the views of the statute's principal advocates. The debates evidenced clear congressional recognition that the proposed legislation accomplished a balance by promoting employment opportunities for workers in the protected age category while protecting the operation of employee benefit plans.[39]

The court below, however, failed to recognize this balance in the statute. It discarded the original and basic purpose of Section 4(f)(2) in favor of its own view of the general objectives of the Act. The sole reference in the court's opinion to the legislative history is a citation to the House Report. From this the court below erroneously concluded that the entire Section 4(f)(2) exemption had the single purpose of permitting employers to consider age in determining benefits for newly-hired older workers.[40]

The Third Circuit's cogent analysis of the full legislative history in *Zinger* is far more persuasive.[41] The

[39] *See, e.g.*, 113 Cong. Rec. 31255 (1967) (remarks of Sen. Yarborough): "[T]his will not disrupt the bargained-for pension plan. . . ."

[40] 542 F.2d at 221. The House and Senate Reports' discussions of Section 4(f)(2) in the "Summary of Major Provisions" sections are virtually identical. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967). However, the Senate Report also includes a further statement by Sen. Javits: "[T]he bill has been improved by the adoption of language . . . exempting the observance of bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions." *Id.* at 14.

[41] Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497, 500-502 (3d Cir. 1977).



court in *Zinger* recognized the tension in the Act between the protection of involuntary early retirement and the protection of the older worker's right to be employed. Nonetheless, it rightly concluded that Congress, faced with those competing considerations, chose to legislate differently with respect to hiring and discharge (without benefits) of older workers and retirement pursuant to a plan paying a reasonable pension. The Third Circuit thus observed:

> [T]he legislative history demonstrates that, while cognizant of the disruptive effect retirement may have on individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge.[42]

For substantially the same reasons set out above, the court concluded that the original intent of the Administration bill was preserved in the Javits amendment and the final enactment.[43] Moreover, it recognized that Section 4(f)(2) must be interpreted in a manner that gives a reasonable meaning to each of its parts, as Congress plainly intended.

For these reasons the Third Circuit held the "subterfuge" language in Section 4(f)(2) must be given a sensible reading that is compatible with the retirement plan exemption. It concluded that a bona fide retirement plan which offers a "not unreasonable" pension is not a "subterfuge" to evade the statute's purposes.[44] Involuntary retirement without benefits, on the other hand, would be tantamount to a discharge

[42] *Id.* at 500.

[43] *Id.* at 501-502.

[44] *Id.* at 504.

and would not fall within the exemption in Section 4(f)(2). This analysis correctly gives meaning to each portion of Section 4(f)(2) and achieves the balance Congress clearly intended in the statute.[45]

The Third Circuit's statutory analysis is further supported by subsequent congressional action expressly approving involuntary retirement of certain federal employees prior to age 65.[46] As this Court rec-

[45] The Third Circuit's reasoning is supported by other federal court decisions interpreting Section 4(f)(2). In Dunlop v. Hawaiian Telephone Co., 415 F. Supp. 330, 332 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Telephone Co., No. 76-2874 (9th Cir. Aug. 26, 1976), the court rejected the Secretary of Labor's challenge to a plan permitting involuntary retirement, interpreting "subterfuge" to refer "to involuntary retirement of a plan member on the basis of age *only if the retirement benefits are not sufficient.*" (Emphasis added.) The court explained:

> Such a reading of the word "subterfuge" is necessary to avoid interpreting § 4(f)(2) as meaningless. . . . The section makes more sense if the phrase is read as contemplating the act of terminating an employee (on the basis of age pursuant to a plan) *without paying the employee substantial benefits.* The "subterfuge" involved is not the act of termination on the basis of age, but the failure to pay the employee sufficient retirement benefits following such a termination.

*Id.* at 332-333 (emphasis added).

Similarly the Second Circuit has held that the fact that a trust "[paid] substantial benefits to a broad class of workers" was a determinative factor in holding that it was not a "subterfuge." de Loraine v. MEBA Pension Trust, 499 F.2d 49, 50 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

[46] In 1968, Congress reaffirmed age 60 as the mandatory retirement age for Foreign Service Officers. 22 U.S.C. §§ 930(a), 1229(e) (1970). In Bradley v. Kissinger, 418 F. Supp. 64, 70 (D.D.C. 1976), the court found that system to be "clearly a bona fide system or plan within the meaning of the ADEA." Pre-age 65 involuntary retirement is also authorized for certain CIA employees, Pub. L. No. 88-643, 78 Stat. 1043 (1964); Army Reserve officers 10 U.S.C. §§ 3843-44; certain regular Army officers, 10 U.S.C.



ognized in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), Congress should not be presumed to have declared unlawful under the ADEA practices *it* has perpetuated with respect to federal employees.[47]

In addition, at approximately the time the ADEA was enacted by Congress, the same congressional committees were considering legislation to regulate pension programs.[48] This legislation only recently emerged from Congress as the Employment Retirement Income Security Act ("ERISA"), Pub. L. 93-406, 88 Stat. 829 (1974). ERISA contains many age-related standards and specifically defines "normal" retirement age as the *earlier* of age 65 or the age provided in the pension plan.[49] This definition is critical to ERISA, since benefits are payable at the earlier of age 65 or normal

§§ 3883-86, 3916, 3921-23; and regular Coast Guard officers, 14 U.S.C. § 293.

[47] In *Espinoza* the Court rejected an EEOC guideline which equated discrimination on the basis of citizenship with discrimination based on national origin, which is prohibited by Title VII. The Court relied in part on the fact that Congress had enacted statutes since Title VII which barred aliens from government service, in spite of Executive Orders banning discrimination on the basis of national origin in federal employment. The Court stated: "[W]e cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of federal employment and, at the same time, prevent private employers from doing likewise." 414 U.S. at 91.

[48] *See, e.g.*, Pension and Welfare Plans, Hearings on S. 3421, S. 1024, S. 1103, and S. 1255 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 90th Cong., 2d Sess. 271-272 (1968). S. 1024 and S. 1103 both were introduced in the previous Session and were pending at the time the ADEA was passed. 113 Cong. Rec. 3922, 4647 (1967).

[49] Section 3(24), 29 U.S.C. § 1002(24).

retirement,[50] and Congress was concerned that early retirement not be used to improperly accelerate funding to avoid taxation.[51] Clearly, if the same congressional committees which considered ERISA had intended to generally outlaw involuntary retirement before age 65 in the ADEA, as the court below concluded, the authorization of an earlier involuntary retirement date in ERISA would be meaningless.

In sum, the legislative history of the ADEA, supported by subsequent congressional action, provides conclusive evidence that Congress intended Section 4(f)(2) to protect involuntary early retirement with a pension. The ruling below emasculates the Section 4(f)(2) exemption and is contradicted by the legislative record and by soundly reasoned opinions of other courts that have concluded that the payment of substantial benefits under a early retirement plan prevents a finding of unlawful age discrimination.

### III. THE DECISION BELOW ERRONEOUSLY REJECTS CONTEMPORANEOUS ADMINISTRATIVE REGULATIONS AND OPINIONS AND FOLLOWS THE POSITION TAKEN BY THE SECRETARY OF LABOR IN HIS AMICUS BRIEF TO THE COURT BELOW

The court below summarily rejected the contemporaneous administrative pronouncements of the official charged with the responsibility of administering the Act, still in effect today, and accepted instead the advocative position taken by the Secretary in his *amicus brief* in this case. It held that the contemporaneous in-

[50] Section 206(a)(1), 29 U.S.C. § 1056(a)(1).

[51] *Cf.* Rev. Rul. 71-147, 1971-1 C.B. 116.



terpretations of the Act "[have] no significance for our decision" because "[a]s evidenced by the Secretary's *amicus curiae* brief and argument, *he has now concluded that the statement in the regulations is erroneous.*"[52] In so doing, the court of appeals acted in direct contradiction to applicable decisions of this Court.

Within a year of the enactment of the ADEA, the Department of Labor issued interpretive regulations which made clear that the Act permits involuntary retirement prior to age 65. Indeed, Section 860.110 of these regulations is entitled "Involuntary retirement before age 65." After quoting Section 4(f)(2)'s authorization for employers to "observe the terms . . . of any bona fide employee benefit plan," this Section further states: "Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement [meets the Section 4(f)(2) requirements]."[53] Moreover, a 1969 amendment by the Secretary to Section 860.110 states that "[the Section 4(f)(2)] exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program." This additional paragraph further noted that Section 5 of the

[52] 542 F.2d at 219 n. 4 (emphasis added). *See also id.* at 222 n. 6, where the lower court rejected the conclusion of the court in Dunlop v. Hawaiian Telephone Co., 415 F. Supp. 330 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Telephone Co., No. 76-2874 (9th Cir. Aug. 26, 1976), with the following comment: "Apparently, the *Dunlop* court did not have the benefit of the Secretary's *revised* position. Accordingly, to the extent that *Dunlop* relied on the regulation, its authority is weakened." (Emphasis added.)

[53] 29 C.F.R. § 860.110, published originally at 33 Fed. Reg. 12227-28 (1968).

ADEA "directs the Secretary of Labor to undertake an appropriate study of . . . involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress."[54] The propriety of involuntary retirement before age 65 was further confirmed by several published opinions of the Department's Wage-Hour Administrator[55] issued shortly after the enactment of the ADEA.[56]

The succeeding portion of the regulations addresses the second purpose of Section 4(f)(2) under the heading "Cost and benefits under employee benefit plans." 29 C.F.R. § 860.120(a). After again setting forth the authorization of Section 4(f)(2) for employers to

[54] 29 C.F.R. § 860.110(b), published originally at 34 Fed. Reg. 322 (1969).

[55] The Secretary of Labor has delegated to the Wage-Hour Administrator the authority to issue interpretations of the ADEA, 36 Fed. Reg. 8753-54, 8756 (1971). Moreover, employers who act in good faith reliance on these interpretations have an absolute defense to liability under the ADEA by virtue of Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259, even if the interpretation is later withdrawn or judicially set aside. *See* 29 U.S.C. § 626(e).

[56] ADEA Opinion, Wage-Hour Administrator Clarence T. Lundquist, Aug. 14, 1968; ADEA Opinion, Wage-Hour Administrator Lundquist, Sept. 6, 1968; ADEA Opinion, Wage-Hour Administrator Lundquist, Sept. 13, 1968.

On November 15, 1968, Administrator Lundquist issued another Opinion, again stating that the Act did not prohibit compulsory retirement at age 62. The Opinion continued:

> This exception [§ 4(f)(2)] does not apply, however, to the involuntary retirement before age 65 of employees who are not participants in the employer's pension programs. *Thus, for example, in the case of employees who are participants in your client's pension plan, such employees may be retired involuntarily before age 65, but employees who are not participants in the plan may not be so retired.* (emphasis added).



"observe the terms . . . of any bona fide employee benefit plan," this regulation states the additional objective of the exemption in permitting employers to consider age in determining the benefits to be accorded newly hired workers in the protected age group. These sections from the interpretive regulations demonstrate the Secretary's contemporaneous recognition that Congress, in adopting Section 4(f)(2), intended to permit both involuntary retirement before age 65 and differentiation in benefits for newly-hired, older workers.

The Fourth Circuit's disregard for the Labor Department's official interpretations is totally inconsistent with the analysis which this Court has applied in similar circumstances. In *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976), this Court recently rejected an interpretative guideline of an agency which was inconsistent with the position taken in earlier regulations:

> We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-859, n. 25 (1975); *Espinoza* v. *Farah Mfg. Co., supra*, 414 U.S. at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore, supra. Id.* at 411.

The *Skidmore* standards are the ones which the court below should have applied in weighing the Department of Labor's published regulations against the "revised" position advocated in the Secretary's brief. Under those standards the weight to be given an ad-

ministrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[57]

Measured against those standards it is clear that the Secretary's advocative position must not be allowed to override his contemporaneous interpretations of Section 4(f)(2) which reflect the legislative history. Compared to the agency's attempted change of position in *Gilbert,* the circumstances here are even stronger, since the Secretary has never withdrawn or amended the published interpretations to reflect any change of position. The Secretary as advocate should not be permitted to circumvent Congress's intention and to ignore his own interpretation as administrator in this cavalier and unorthodox manner. As the Third Circuit aptly observed in *Zinger:*

> [T]he Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committees which declined that proposal when it was forthrightly presented to them. Thus, rather than proposing an amendment to Congress, as Congress had instructed [in Section 5 of the Act], the Secretary seeks to change the Act by court decision or administrative fiat.[58]

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[57] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *See also* United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), where the Court rejected an argument of the Securities and Exchange Commission in an *amicus* brief which "flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release." *Id.* at 858 n. 25.

[58] 14 Fair Empl. Prac. Cas. at 503. *See also id.* at 502.



## CONCLUSION

The foregoing discussion demonstrates that the decision of the Fourth Circuit below ignores the plain language of the Act, its legislative history, and the contemporaneous interpretations of the Department of Labor. The decision would read Section 4(f)(2) out of the Act and would make Section 5 utterly meaningless. As the Third Circuit recognized in *Zinger,* arguments for this result go to the merits of the exemption. As such, they are "properly matters of legislative concern and evaluation," and "miss the mark when urged upon a court in support of a statutory interpretation."[59]

For these reasons the Chamber submits that the judgment of the court of appeals below should be reversed.

Respectfully submitted,

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[59] 14 Fair Empl. Prac. Cas. at 503.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-906

UNITED AIRLINES, INC.,

Petitioner,

v.

HARRIS S. McMANN,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

# MOTION OF THE NATIONAL RETIRED TEACHERS ASSOCIATION, THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICI CURIAE (consent of petitioner refused)

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The National Retired Teachers Association and the American Association of Retired Persons are affiliated and jointly administered nonprofit corporations having a combined membership of over 10,000,000 people. The Gray Panthers is a nonprofit corporation having a nationwide membership and devoted to advocacy on behalf of the elderly with respect to legal and social issues particularly affecting their interests.

The above organizations believe, and have repeatedly taken positions in support of, the proposition that stereotyped notions concerning the ability of older workers are wrong. Specifically, the practice of mandatory early retirement is regarded by movants as one of the most pernicious forms of discrimination because of age. While movants believe the existing protections of the federal Age Discrimination in Employment Act are inadequate because of the upper age

limit, they also believe that those protections intended by the Act must be preserved.

When Congress enacted the Act in 1967 it took extraordinary pains to clarify the meaning of the employee benefit plan exception, 29 U.S.C. §623(f)(2), on the floor of both the House and the Senate. In the House, Congressmen Daniels, Dent, Randall, and Smith expressly and unequivocally addressed themselves to its meaning, 113 CONG. REC. 34745, 34746, 34747, and 34752, and their counterparts, Senators Javits and Yarborough, in a colloquy directed specifically and narrowly to the issue now before the Court, could not have been more explicit. 113 CONG. REC. 3124, 3125. Senator Young's concluding statement removed any possibility of a doubt concerning the meaning of the exception. 113 CONG. REC. 31256, 31257. The meaning intended by Congress, simply, is that the exception



was designed solely to permit employers to hire older workers without necessarily including them in benefit plans. That uncontrovertable legislative intent cannot be ignored. Train v. Colorado Public Interest Research Group, -- U.S. --, 96 S. Ct. 1938 (1976).

In promulgating an interpretive regulation, 29 C.F.R. §860.110, which sanctioned involuntary retirement before the age of 65 if effected pursuant to a benefit plan, the Secretary of Labor cavalierly engaged in an act of legislation which completely frustrated the intention of Congress to protect millions of workers from early retirement. See McMann v. United Air Lines, Inc., 542 F.2d 217 at 222 (1976).

It is submitted that movants can make an important contribution toward resolution of the issue of law before the Court. While the Secretary of Labor, who will appear as

amicus curiae, has altered his initial interpretation of the benefit plan exception, he has not completely abandoned the hypothesis that early retirement pursuant to a benefit plan might be justified under certain circumstances. See Zinger v. Blanchette, -- F.2d -- (3rd Cir. 1977)(Appendix A, Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari). In the lower court the respondent relied upon the Secretary of Labor's present interpretation (Appellant's Brief before the Fourth Circuit at 11) and the lower court apparently felt its decision was in harmony therewith. McMann v. United Air Lines, Inc., supra, 542 F.2d at 219 n. 4. Thus, the respondent need not challenge the Secretary's posture in order to obtain the relief afforded him in the lower court and, of course, the Secretary's amicus brief will hardly address the issue of law from



the perspective of your movants. It is reasonable to expect that bureaucratic paralysis will militate against the confession of initial error and in favor of an argument founded upon the value of changed interpretations in response to empirical experience. Your amici's contention is that there was, in the beginning, no room for interpretation and that an initial mistake created and perpetuated the confusion which brought the instant case to this Court.

Therefore, it is respectfully urged that the instant motion be granted.

DATED: March 15, 1977.

Respectfully submitted,

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Attorney for Movant

Of Counsel:

Robert B. Gillan, Esq.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1709 West Eighth Street, Suite 500, Los Angeles, CA 90017.

On March 16, 1977, I served the within MOTION OF THE NATIONAL RETIRED TEACHERS ASSOCIATION, THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICI CURIAE (consent of petitioner refused) on the attorneys in said action, by placing 3 copies thereof enclosed in sealed envelopes with postage fully prepaid, in the United States post office mail box at Los Angeles, California addressed as follows:

Arnold T. Aikens, Esq.
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277 South Washington St., Ste. 212
Alexandria, Virginia 22314

Ronald J. James, Administrator
Wage and Hour Division
Employment Standards Administration
Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 16, 1977, at Los Angeles, California.

Robert B. Gillan

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1977.

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IN THE

# Supreme Court of the United States

October Term, 1976
No. 76-906

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

HARRIS S. MCMANN,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.**

## Brief of Amici Curiae National Retired Teachers Association, American Association of Retired Persons, Legal Services for the Elderly Poor and Gray Panthers.

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## Interest of Amici.

This brief amici curiae is filed under Rule 42, the prior consent of the parties having been obtained. See Exhibit "A", attached hereto.

The National Retired Teachers Association and the American Association of Retired Persons are affiliated and jointly administered nonprofit corporations having a combined membership of over 10,000,000 people. The Gray Panthers is a nonprofit corporation having a nationwide membership and devoted to advocacy

on behalf of the elderly with respect to legal and social issues particularly affecting their interests. Legal Services for the Elderly Poor is funded by the Administration on Aging of the Department of Health, Education and Welfare and by the Legal Services Corporation. It has appeared before this Court as co-counsel or as amicus in numerous cases involving issues affecting the elderly, *e.g., Massachusetts Board of Retirement v. Murgia,* ..... U.S. ....., 96 S.Ct. 2562 (1976); *Ortwein v. Schwab,* 410 U.S. 656 (1973); *Allied Chemical Workers v. Pittsburgh Plate Glass,* 404 U.S. 107 (1971); and *Graham v. Richardson,* 403 U.S. 365 (1971).

The above organizations believe, and have repeatedly taken positions in support of, the proposition that stereotyped notions concerning the ability of older workers are wrong. Specifically, the practice of mandatory early retirement is regarded by amici as one of the most pernicious forms of discrimination because of age. While amici believe the existing protections of the federal Age Discrimination in Employment Act are inadequate because of the upper age limit, they also believe that those protections *intended* by the Act must be preserved.

**Summary of Argument.**

The federal Age Discrimination in Employment Act of 1967 (hereafter the "Act") unequivocally prohibits the use of arbitrary age criteria in employment decisions affecting persons between the ages of 40 and 65; the only exception is the existence of a demonstrable relationship between an arbitrarily selected age and the demands of a particular job. Involuntary retirement before the age of 65 is expressly prohibited, and the employee benefit plan provision, when read within con-



text, provides no support for a different conclusion. The legislative history demonstrates that Congress did not intend by that provision to permit early involuntary retirement. Following the Act's passage, the Secretary of Labor disregarded both the language of the Act and the legislative history and issued an interpretive regulation which construed the Act to permit forced early retirement pursuant to a benefit plan. The ensuing confusion was compounded by the Secretary's change in position and the responsive efforts by three lower courts to achieve formulations of their own, all of which contradicted both the language of the Act and the legislative history. The lower court's decision in the instant case is the first correct analysis of the benefit plan provision in the context of early retirement and thus it should be affirmed.

## ARGUMENT.

### I.

### Facially the Act Prohibits the Use of an Arbitrary Age Criterion for Involuntary Retirement Before the Age of 65.

Section 2 of the Act, 29 U.S.C. §621, sets forth the following statement of congressional findings and purpose:

> ". . . [O]lder workers find themselves disadvantaged in their efforts to retain employment, . . .; the setting of arbitrary age limits regardless of potential for job performance has become a common practice, . . .;
>
> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; . . . ." 29 U.S.C. §621(a)(1), (2), and (b).

Implementing that preamble is the following specific measure:

> "It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to *discharge* any individual *or otherwise discriminate* against any individual with respect to his compensation, *terms, conditions,* or privileges of employment, because of such individual's age;
>
> (2) to . . . classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect his status as an employee,* because of such individual's age; . . . ." §4, 29 U.S.C. §623(a) (emphasis added).

Unquestionably, and before turning to the exceptions, the general prohibition against employment discrimination based upon age embraces involuntary retirement before the age of 65 whether with or without a pension. While it might be possible to argue that a distinction exists between a "discharge" (within the meaning of the Act) and a retirement, the latter is certainly embraced within the other language of the prohibition, *i.e.*, ". . . terms, conditions, or privileges of employment . . .; . . . adversely affect his status as an employee. . . ."[1]



The only exception to the Act provides:

> "(f) It shall not be unlawful for an employer . . .
>
> (1) *to take any action otherwise prohibited under subsections (a), (b), (c), or (e)* of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; . . . ." §4(f)(1), 29 U.S.C. §623(f)(1) (emphasis added).

---

[1]In *Zinger v. Blanchette,* 549 F.2d 901 (3rd Cir. 1977), the court concluded: ". . . No statutory provision explicitly prohibits early retirement on pension. . . ." 549 F.2d at 905. How the court could have concluded that involuntary early retirement does not affect an employee's "status as an employee" or constitute a "term" and "condition" of employment is mystifying. Section 15 of the Act, 29 U.S.C. §633a, which protects federal government employees, provides that "[a]ll personnel actions . . . shall be made free from any discrimination based on age." 29 U.S.C. §633a(a), and the authority given the Civil Service Commission to establish reasonable exemptions in the form of maximum age requirements is delimited to the situation where ". . . age is a bona fide occupational qualification. . . ." Since, in general, federal employees are automatically afforded retirement benefits, 5 U.S.C. §8334, it is free from doubt that retirement before the age of 65 with a pension constitutes "discrimination based on age" in the absence of a bona fide occupational qualification exception.

In contrast, the employee benefit plan provision is not, by its terms, an exception:

> "(f) It shall not be unlawful for an employer . . .
> . . .
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; . . . ." §4(f)(2), 29 U.S.C. §623(f)(2).

Notably absent in the latter paragraph, while present in the former, is a recognition that the action condoned would be "otherwise prohibited." If Section (f)(2) were considered alone, the absence of that language, or its equivalent, would not necessarily mean that it does not constitute an exception to the general prohibitions of the Act; however, since such language does appear in another paragraph within the same subsection, those words necessarily become significant as a guide to interpretation. That proposition is reinforced by the absence, in the language of the statute containing the prohibitions, of such words as "except as provided in subparagraph (f)(2)." Thus, if paragraph (2) of subparagraph (f) were construed to allow involuntary retirement before the age of 65, such a construction would bring it into facial contradiction with subparagraph (a), which prohibits the use of age as a criterion for the described personnel actions, including retirement. *See* Note 1, *supra; cf. Peters v. Missouri Pacific Railroad Co.*, 483 F.2d 490 at 492 n. 3 (5th Cir. 1973), *cert. denied*, 414 U.S. 1002 (1973) (retirement plans are "conditions of employment" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h)).



Reconciliation of the benefit plan provision with the language of the Act defining unlawful practices can easily be achieved through a consideration of the Act as a whole. Two key qualifying clauses point the way:

> 1. "which is not a subterfuge to evade the *purposes* of this chapter;" and
> 2. "except that no such employee benefit plan shall excuse the failure to hire *any* individual." (emphasis added).

With respect to the clause quoted first, the *purposes* of the chapter relevant to the present question are:

> ". . . to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; . . . ." §2(b), 29 U.S.C. §621(b).

It is clear that involuntary retirement before the age of 65 would frustrate both of those stated purposes. Involuntary retirement is an employment practice triggered solely by age and is a mechanism by which the employer abdicates any evaluation of skills and abilities. Hence age then becomes an "arbitrary" factor used to frustrate employment based upon ability.[2]

With respect to the second qualifying clause quoted above, according to its language if an employee were

---

[2]Section 4(f)(2) also permits employers "to observe the terms of a bona fide seniority system. . . ." That language further underscores the fact that §4(f)(2) is not, on its face, an exception to the Act. Because promotions, layoffs and pay raises under seniority systems depend solely upon length of service, age is a neutral factor in such employment practices.

involuntarily retired before the age of 65, he could reapply for his job as a presumptively qualified individual and be surrounded by the protections of the Act. *McMann v. United Air Lines, Inc.*, 542 F.2d 217 at 220. In *Hodgson v. American Hardware Mutual Insurance Co.*, 329 F.Supp. 225 (D. Minn. 1971), the court correctly observed:

> ". . . [C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old. . . ." 329 F.Supp. at 229.

The court in *Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), while construing the benefit plan provision to permit involuntary retirement before the age of 65, was cognizant of the strange practical effect of its decision:

> ". . . Logically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anomaly that a person who has been involuntarily retired by one company before 65 may not be discriminated against in applying for employment at another company. . . ." 549 F.2d at 909.

Since ". . . [t]here is a presumption against a construction which would render a statute ineffective or inefficient . . .," *Bird v. United States,* 187 U.S. 118 at 124 (1902), the question arises whether one exists which both harmonizes the expressed purpose of the Act with all the language of the benefit plan provision and gives content to the latter. One does, indeed, exist; it requires an appreciation of the obvious fact that employers are prohibited by the Act from engaging in two distinct forms of discrimination, one



of which is concerned with employment as a *status,* the other with the *circumstances* incident to that status. Age-based personnel actions which determine the existence or nonexistence of a job are far more critical than the allocation of fringe benefits under employee benefit plans. While fringe benefits are important, they are qualitatively distinguishable from employment *per se* with its accompanying social, psychological, and emotional rewards.[3] Construing the benefit plan provision to permit age-based classifications only with respect to fringe benefits, when economically justified, reconciles all of the Act's language. It fosters the articulated congressional aim "to promote employment of older persons based on their ability rather than age;" and the "subterfuge" language in §4(f)(2) gives meaning to the second stated purpose, *i.e.,* to prohibit *arbitrary* age discrimination in employment. If economic considerations justify reduced or no fringe benefits to

---

[3]". . . Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatsoever.

"There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person is inactive and without basic interests. It is easy for the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms." *See Retirement, a Medical Philosophy and Approach,* AMA Committee on Aging, pages 6, 7 (Exhibit B).

a newly-hired elderly worker the employer can "observe the terms" of the benefit plan without being guilty of "arbitrary age discrimination." For example, if an employer provides a combination health, disability, and life insurance package for its employees and if the contribution provided for by the plan, whether negotiated or not, would not provide coverage for a recently-hired older employee, the employer would not be required to assume a larger economic burden. Likewise, if a pension plan required a given number of years of credited service as an eligibility condition, a newly-hired older worker, with no chance of earning the required credited service, could be excluded from the plan or, perhaps, be included with reduced benefits. Conversely, if deviation from the literal terms of a fringe benefit plan could be accomplished to include a newly-hired older worker without imposing a disproportionate burden upon the employer, the failure to do so would be "arbitrary age discrimination" and the plan would be "a subterfuge to evade the purposes" of the Act.[4]

---

[4]See Letter to Prentice-Hall from Warren D. Landis, Acting Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, dated March 2, 1977 which states in part:

> "In * * * [a] letter dated December 31, 1968, * * * [Prentice-Hall] inquired whether employees who were hired while in the 40 to 65 year old age group protected by the Age Discrimination in Employment Act could be lawfully excluded from participation in their employer's pension or retirement plan. . . .
>
> "In our response dated February 9, 1970, we stated that at that time we were not prepared to conclude that the exclusion of newly hired older employees from pension or retirement plans would violate the Act. . . .
>
> "Since that time we have taken positions with respect to many specific plans and it is the purpose of this letter to set forth in one document a current and more detailed response to * * * [Prentice-Hall's] original question. The pertinent statutory language is set forth in Section 4(f)(2) of the Act (29 U.S.C. 623(f)(2)), which provides in pertinent part that:
>
> 4(f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * *
>
> (2) to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual
>
> * * *
>
> "As is apparent from this language, an employer must demonstrate that the exclusion of any employees protected by the Act from an employer's pension or retirement plan is not a subterfuge to evade the purposes of the act. In other words, the exclusion must be clearly based on nonage factors:
>
> "Thus, where a pension plan provide (sic) for a defined benefit, such as a flat dollar amount per month after retirement or an amount determined by a formula based on salary and years of service, Section 4(f)(2) may justify the exclusion of an older worker hired when he or she is less than five years from the plan's stated 'normal retirement age'. The employer, in our view, would be able in such a case to demonstrate that the plan provision authorizing the exclusion is not a subterfuge to evade the purposes of the Act, since the substantial cost of funding a specific level of benefits in a relatively short period of time would be the reason for the exclusion. In other words, the employer could prove that cost, rather than age, explains the otherwise discriminatory practice. Under these circumstances, we would not assert any violation, provided that the other tests of the exception were met.
>
> "This assumption of legality would not apply to a provision which excluded employees from a defined benefit plan who were hired when they were more than five years from normal retirement age and, in those cases, the employer, in order to qualify for the exception, would have to demonstrate that the longer exclusionary period was based on *substantial* cost considerations.
>
> "Similarly, where a retirement plan is funded by defined contributions, as in a money purchase or deferred profit-sharing plan, the age of an employee when hired makes no difference in the employer's contributions. In a defined

(This footnote is continued on next page)



In short, the only possible interpretation of the benefit plan provision which harmonizes the language of the

Act is that it refers only to the granting or withholding of fringe benefits and not to personnel actions affecting the existence or non-existence of employment before the age of 65.[5] The interpretation suggested

contribution plan, the employer does not have to fund for a specific level of benefits, and the benefit received by an employee at retirement equals only the value of the contributions made on his behalf. Thus, neither actuarial considerations nor age affect the level of an employer's contributions. Accordingly, we would consider the exclusion of a newly hired older worker from a defined contribution plan to be a violation of the ADEA that is not excused under Section 4(f)(2)." 3 Prentice-Hall, *Pension and Profit Sharing* ¶120,905.

[5]*Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), deserves another parenthetical comment at this point. Section 5 of the Act, 29 U.S.C. §624, directs the Secretary of Labor ". . . to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress." The court in *Zinger* imported the following meaning to that section:

> "The fact that legislation requires the Secretary to study involuntary retirement and submit legislative recommendations to the President and Congress shows recognition of the problem by the legislature. It chose to await further data before deciding what, if any, further action is warranted. . . ." 549 F.2d at 909.

That observation will be refuted by an examination of the legislative history, but it is believed appropriate to make a comment based upon the face of the statute. In the first place, the court in *Zinger* reasoned from an erroneous premise, *i.e.,* that "compensated involuntary retirement" is outside the scope of the Act. *See* n. 1, *supra.* Secondly, it could be just as easily posited that the Act forbade involuntary retirement before the age of 65 and that Congress desired further data to determine if involuntary retirement at a later age should likewise be prohibited. While Section 3(b) of the Act, 29 U.S. §622(b), requires, within six months following the effective date of the Act, a report from the Secretary concerning the lower and upper age limits, and Section 13, 29 U.S.C. §632, requires annual appraisals thereof, those provisions do not render Section 5 superfluous (given the suggested interpretation) because the latter sections perform different functions. Sections 3 and 13 relate to the lower, as well as upper age limits; and they encompass all forms of age discrimination forbidden by the Act. Section 5, on the other hand, requires a more thorough study and relates to only one form of age-based discrimination.



by the petitioner comports with neither the text chosen by Congress, logic nor common sense; as will be shown below it certainly does not comport with recorded legislative intent.

## II.

## Legislative History Conclusively Proves That the Benefit Plan Provision Was Never Intended to Permit Involuntary Retirement Because of Age Before the Age of 65.

In the preceding section your *amici* demonstrated that the lower court's decision was not only consistent with, but was required by the language alone of the Act. At the very least, the lower court's construction of the benefit plan provision is the most logical; assuming, *arguendo,* that the Act's language admits of a contrary interpretation, legislative history is the appropriate interpretive vehicle. *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 96 S.Ct. 1938 (1976). In the instant case, congressional intent underlying the benefit plan provision is so clearly expressed as to dispel the slightest doubt. Indeed, pains were taken on the floor of both the House and Senate, at the time of deliberation and passage of the Act, to make its meaning clear to employers and employees. On the day the Senate approved the Act, Senator Javits began discussion of the benefit plan provision with the following statement:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the

often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers." 113 CONG. REC. 31254-31255 (November 6, 1967).

Thereupon the following colloquy occurred between Senator Javits and Senator Yarborough:

"The first question, Mr. President, which also was raised with me by our minority leader, the Senator from Illinois [Mr. Dirksen] relates to that section 4(f)(2) of the bill, found at page 20, line 20 to 25. As the Senator from Texas described it, that subsection provides an exemption from the prohibitions of the bill in the case of observance of bona fide seniority systems or employee benefit plans such as a pension, retirement, or insurance plan.

"The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others.



"I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. I ask whether he agrees with that interpretation of subsection (2) of section 4(f) of the bill, found on page 20, lines 20 to 25, inclusive.

"Mr. YARBOROUGH. I wish to say to the Senator that that is basically my understanding of the provision in line 22, page 20 of the bill, clause 2, subsection (f), of section 4, when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." 113 CONG. REC. 31255 (November 6, 1967).

Senator Young concluded the substantive dialogue with a statement which removes any conceivable doubt:

> ". . . The bill provides for the Secretary of Labor to submit annually a report to the Congress covering his activities each year in connection with matters included in this bill. This proposed report must also contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this bill. I am hopeful that if this proposal is enacted into law the Secretary of Labor will make a careful study of the feasibility of continuing the outdated and unjustifiable concept of 65 as an arbitrary age for forced retirement." 113 CONG. REC. 31256 (November 6, 1967).

The balance of Senator Young's remarks, which condemned the practice of mandatory retirement at any age, prove conclusively his understanding that the Act had the effect of eliminating mandatory retirement before the age of 65; and Senator Javits, who was instrumental in drafting the language of the benefit plan provision, and Senator Yarborough, who was the manager of the bill, thanked Senator Young for his contribution. 113 CONG. REC. 31257 (November 6, 1967).[6]

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[6]It is inferable that the reason for the particular care with which the Senators clarified the meaning of the benefit plan provision was that the interpretation urged by the petitioners was initially considered and rejected. In a message dated January 23, 1967 to Congress, President Johnson recommended a law prohibiting age-based employment discrimination and containing an exception ". . . where the employee is separated under a regular retirement system." 113 CONG. REC. 1089-1090 (January 23, 1967); and the Administration bill used the following language:



While the explicitness with which the Senate clarified the meaning of the benefit plan provision could hardly be exceeded, it was at least equalled on the floor of the House in connection with its passage of the bill. The language employed by the various congressmen who addressed themselves to the issue speaks for itself:

> CONG. SMITH: "Since the language of sec. 4(f) is not clear, the language of the report is important. The report states that: 'This exception serves to emphasize the primary purpose of the bill—hiring older workers—by permitting employment without necessarily including such workers in employee benefit plans.'" 113 CONG. REC. 34745 (December 4, 1967).
>
> CONG. DANIELS: "The point should be made, however, that the bill takes into full consideration the problems and interests of employers. It allows for situations in employment where age is a bona fide occupational qualification for a particular job. It also takes account of the problems of employers in the field of pension and other benefit plans. The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is

---

"It shall not be unlawful for an employer . . . to separate involuntarily an employee under a policy or system. . . ." S. 830, 90th Cong. 1st Sess. §4(f)(2) (1967).

Senator Javits' statement at a committee hearing in connection with an amendment proposed by him to the benefit plan exception included the following remark:

> "The Administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. . . ." 113 CONG. REC. 7076 (March 16, 1967).

It is clear that the Senator, in his subsequent statements, intended to expressly repudiate any initial approval of the involuntary retirement feature of the Administration's bill.

designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits." 113 CONG. REC. 34746 (December 4, 1967).

CONG. DENT: ". . . If someone cannot perform his or her job, the bill provides no relief simply because the individual is between the ages of 40 and 65. It provides relief only when a qualified person who is ready, willing, and able to work is unfairly denied or *deprived* of a job solely on the basis of age." (emphasis added). . . .

"It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers —by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vital to the legislation, and was favorably received by witnesses at the hearings." 113 CONG. REC. at 34747 (December 4, 1967).

CONG. HALPERN: "As clearly stated in this bill, the setting of arbitrary age limits regardless of potential for job performance has become a common practice. Thousands of men and women, not yet ready for retirement, are being elbowed out of productivity by a youth fixation which ignores their skills and capabilities."

. . .

"While nearly half of the states already have anti-age discrimination laws, there are still over a



million Americans over the age of 40 who are out of work. Many thousands of these men and women are not yet ready for voluntary retirement, yet, while they may be at the crest of their skills and capabilities, employers ignore these skills and discard these capabilities." 113 CONG. REC. at 34749 (December 4, 1967).

Congresswoman Dwyer, in her remarks, introduced into the record with no challenge to its accuracy an article in the Prentice-Hall Lawyers Weekly Report which described the bill, in part, as follows:

"However, there would be these *exceptions:*

(1) When age is a bona fide *occupational qualification.*

(2) Companies wouldn't have to take recently hired older workers into their *pension plans.*

(3) *Seniority rules* that apply to newly hired older workers." 113 CONG. REC. at 34752 (December 4, 1967).

The significance of the above-quoted remarks on the floor of both the House and the Senate lies in the fact they are uncontradicted, specific, and harmonious. In *Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), the court ignored the legislative history quoted above, choosing instead to undertake a painstaking analysis of earlier testimony presented during committee hearings; while the court's evaluation of that legislative history, in light of the later and more persuasive evidence, was erroneous, the history did reveal the existence of concern with respect to the issue of involuntary retirement before the age of 65.

*See also* Brief of the Chamber of Commerce of the United States *Amicus Curiae* in which the following statement appears (p. 2):

> "These issues were also of great importance to the Chambers' members in 1967 when Congress was considering the legislation which is interpreted by the court below. As a result, the Chamber testified before both the Senate and House subcommittees. . . ."[7]

It is therefore clear that the absence in the various remarks of any hint that approval of involuntary retirement before the age of 65 was intended was not inadvertent.

Accordingly, it is respectfully submitted that the pertinent legislative history is susceptible of no interpretation other than that the employee benefit plan provision was not intended to render lawful involuntary

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[7]The Chamber of Commerce's brief also argues:

> "It has been authoritatively recognized that mandatory retirement provisions in pension plans provide employers flexibility in personnel management to meet special conditions in particular industries, *and also to attract and advance younger employees.*" p. 10 (emphasis added).

Compare Section 2 of the Act, 29 U.S.C. §621(a), (b):

> "The Congress hereby finds and declares that
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, . . .
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, . . .
>
> . . .
>
> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; . . . ."



retirement, whether with or without a pension, before the age of 65.[8]

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[8]The legislative history of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.*, reflects a congressional policy to allow age discrimination in employee benefit plans only with respect to eligibility to participate and with respect to benefit levels:

> "Under plans which provide defined or specific benefits, it is more expensive for an employer to finance an equivalent retirement benefit for an older employee than for a young employee. *To avoid making it more difficult for older workers to find employment, the bill permits plans which provide defined benefits to exclude from participation employees who begin employment within five years of the normal retirement age.* This, for example, permits a defined benefit plan which provides for a normal retirement age of 65 to exclude an employee who begins work at the age of 60. Such exclusions are not permitted under money purchase pension plans or profit sharing plans. Under these plans, an employee is not promised any specified benefits, but instead is entitled only to the amount that is in his account (employer contributions, forfeitures, and employee contributions, adjustments for earnings, losses, and expenses) with the result that it is no more expensive for the employer to cover older employees than younger employees under such plans." Legislative History of the Employee Retirement Income Security Act of 1976 at 2606.

Thus, the ADEA and ERISA both express concern for the elderly worker and incorporate similar provisions focused upon the economics of benefit plans. Statutes which share similar language and common purposes are to be construed together, *Northcross v. Bd. of Educ. of Memphis City Sebrook,* 412 U.S. 427 (1973), so that a workable and consistent whole is made of the entire system of legislation. *See Safeway Portland Emp. Fed. Credit Union v. F.D.I.C.,* 506 F.2d 1213, 1217 (9th Cir. 1974), particularly in the area of labor law, *see Muniz v. Hoffman,* 422 U.S. 454 (1975); *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Exp. & Stat. Emp. v. Railroad Ret. Bd.,* 239 F.2d 37 (D.C. Cir. 1957). Since all private pension plans are subject to the provisions of ERISA, 29 U.S.C. §1003, it and the ADEA should, it is submitted, be read as an organic whole to determine the extent of congressionally sanctioned age discrimination permitted in private plans; and such discrimination is sanctioned by them only with respect to fringe benefits and not employment *per se*.

III.

**Decisions of Lower Federal Courts Inconsistent With That of the Court Below Were Based Upon the Uncritical Acceptance of an Erroneous Interpretive Regulation of the Secretary of Labor or Were the Result of Faulty Analysis.**

Section 9 of the Act, 29 U.S.C. §628, empowers the Secretary of Labor to issue appropriate rules and regulations and, in 1969, the following interpretive regulation was promulgated:

> "(a) Section 4(f)(2) of the Act provides that 'It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.' Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.
>
> "(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. . . ." 29 C.F.R. §860.110.



That interpretive regulation does not reflect the present thinking of the Secretary, however, as evidenced by the support given to the respondent in the lower court and this Court, and by earlier Labor Department suits raising the same issue. *Brennan v. Taft Broadcasting Co., supra,* 500 F.2d 212 (5th Cir. 1974); *Dunlop v. Hawaiian Telephone Co.,* 415 F.Supp. 330 (D. Hawaii 1976); *Dunlop v. General Telephone Co. of California,* 13 F.E.P. Cases 1210 (D. Cal. 1976).[9]

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[9]In his report to Congress in January of 1976, concerning activities under the Act in 1975, the Secretary stated:

> "[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose—i.e., is not in the plan for the sole urpose (sic) of moving out older workers, which purpose has now been made unlawful by the ADEA." U.S. Dept. of Labor, Report covering activities under the Act during 1974 (January 31, 1975).

On February 9, 1976, at a hearing before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor (on H.R. 2588, which would remove the 65-year-old upper limit to the Act's protections), Ronald J. James, Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor, stated:

> "A major area of continuing concern is the problem of involuntary retirement prior to age 65. Many pension plans permit the employer—at his option—to force the retirement of any employee who is 55 or over—or in some cases who is 60 or over—without regard to the quality of performance or to any other factor other than age.
>
> "As you are probably aware, it is the Department's position that such forced retirements prior to age 65 are illegal. To allow such retirements, under section 4(f)(2), without a clear economic justification based on the need to preserve the economic integrity of the pension plan—and no economic justification has been advanced—creates a large loophole in the act's protections."

It is believed unnecessary to grapple with the problem of judicial deference to administrative interpretation, *see Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), or the legal signifi-

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The initial interpretation did, however, in at least two cases mislead not only the courts but, apparently, also the parties. In *Steiner v. National League*, 377 F.Supp. 945 (C.D. Cal. 1974), *aff'd without opinion*, No. 74-2604 (9th Cir. October 15, 1975), the court and the parties assumed the validity of the Secretary's interpretive regulation and litigated the issue of the "bona fide" nature of the pension plan. Likewise, in *McKinley v. Bendix Corp.*, 420 F.Supp. 1001 (W.D. Mo. 1976), the court upheld the involuntary retirement of a 55-year-old employee within the context of a dispute, in part, over the meaning of the Secretary's interpretation, as distinguished from its validity. Those two cases are of no relevance because they do not address the issue now before this court.[10]

The three decisions, aside from the instant case, which examined in detail the question of whether the benefit plan provision could ever justify involuntary

cance of an administrative agency's change in position, *see General Electric Co. v. Gilbert*, — U.S. —, 97 S.Ct. 401 (1976). Suffice it to say that while a changed interpretation may not, in certain cases, receive "high marks," legislative history is the test by which the mark is determined. *General Electric Co. v. Gilbert, supra*, — U.S. at —, 97 S.Ct. at 412; *see also Train v. Colorado Public Interest Research Group, supra*, 426 U.S. 1, 96 S.Ct. 1938 (1976).

[10]Another case which is sometimes mentioned in connection with the instant question is *de Lorraine v. MEBA Pension Trust*, 499 F.2d 49 (2nd Cir. 1974). That decision is not even remotely germane; the court merely commented upon the issue and expressly declined to resolve it. 499 F.2d at 51 n. 7. A tangential decision is *Hodgson v. American Hardware Mutual Insurance Co., supra*, 329 F.Supp. 225 (D. Minn. 1971), which approved that aspect of the Secretary's interpretive regulation condemning early retirement of a worker not enrolled in a benefit plan. Although the court did not challenge the portion of the interpretive regulation at issue in the instant case, it did acknowledge that the purpose of the benefit plan provision was to preserve the financial integrity of such plans. 329 F.Supp. at 229.



retirement before the age of 65 make interesting reading. In *Brennan v. Taft Broadcasting Co., supra*, 500 F.2d 212 (5th Cir. 1974), a suit on behalf of an involuntarily retired 60-year-old employee, the Secretary argued that the plan in question was not bona fide because of uncertainty regarding the mandatory retirement age and, further, that the employer was required, under the Act, to consider the retired employee's application for reemployment. The court, while acknowledging the existence of legislative history revealing a purpose to protect ". . . plans which in the absence of the (f)(2) exception would be too costly for the employer to maintain, . . ." 500 F.2d at 216, did not feel such evidence was germane:

> ". . . It is hardly reasonable to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine whether what a statute plainly says is what it really means." 500 F.2d at 217.

To the Secretary's argument that the employee should have been reconsidered for employment under the provision "no such employee benefit plan shall excuse the failure to hire any individual," the court responded:

> ". . . If retired employees must be rehired immediately, the right to insist on compliance with a plan is an illusion. Congress could not have possibly intended, or directed, such a contradictory, irreconcilable result. . . ." 500 F.2d at 218.

The *Taft Broadcasting* court's confusion speaks for itself.[11] It first confused the importance of the "plain

[11]The court also concluded that, by definition, a benefit plan predating the Act could not be a "subterfuge to evade

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meaning" axiom of statutory construction as a vehicle to avoid case by case examinations to ascertain if congressional intent is effectuated, *See Braunstein v. Commissioner,* 374 U.S. 65 (1963), with its diminished interpretive importance when a rule for future guidance in all cases is sought. *See Train v. Colorado Public Interest Research Group, Inc., supra,* 426 U.S. 1, 96 S.Ct. 1938 (1976). Furthermore, because of the proviso "no such employee benefit plan shall excuse the failure to hire *any* individual," the meaning is certainly not clear; and, far from manifesting "conflicting collections of speeches" the legislative history reflects unanimity concerning the meaning of the benefit plan provision. Finally, it is inherently inconsistent to predicate a decision upon the supposed "plain meaning" of one passage of a statutory provision and to find that Congress did not mean what it said with respect to another passage within the same sentence.[12] The court was, however, correct in observing that Congress could not have intended that an involuntarily retired employee

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the purposes of the Act." Compare the House Committee Report accompanying the Act:

> "It is important to note that exception (3) [§4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. . . ." H.R. REP. NO. 850, 90th Cong., 1st Sess., 2 U.S. CODE CONG. & AD. NEWS, 2213 at 2217 (1967).

[12]*See also Dunlop v. General Telephone Co. of California, supra,* 13 F.Ξ.P. Cases 1212 (C.D. Cal. 1976), in which the court agreed with *Taft Broadcasting's* erroneous conclusion that:.

> "The Section (f)(2) exception is clear and unambiguous and legislative history may not be used to override the plain meaning of the statutory exception. . . ." 13 F.E.P. Cases at 1212.

Indeed, the court went even further than *Taft Broadcasting* and observed gratuitously that the Secretary's current interpretation was not even supported by the legislative history upon which he attempted to rely.



could reapply for his job and become surrounded by the protections of the Act; Congress did not intend that any employee under the age of 65 would be subject to involuntary retirement under a benefit plan.

In *Dunlop v. Hawaiian Telephone Co., supra,* 415 F.Supp. 330 (D. Hawaii 1976), another suit instituted in behalf of employees subject to involuntary retirement at the age of 60, the court constructed a novel formulation postulated upon the language: "which is not a subterfuge to evade the purposes of this chapter." Although acknowledging the existence of the legislative history discussed earlier, and despite the fact the plaintiff was the Secretary of Labor, the court based its analysis upon the interpretive regulation which by its terms permitted early involuntary retirement pursuant to a benefit plan. Therefore, reasoned the court, the question presented was what type of plan is a "subterfuge to evade the purposes" of the Act. It concluded that a benefit plan providing for early retirement would be a subterfuge if the retirement were not accompanied by the payment of "substantial benefits." The court overlooked the more obvious meaning, *i.e.,* that a newly hired older worker may not be excluded from fringe benefits pursuant to the literal terms of a plan if the employer would not thereby be required to assume a disproportionately greater economic burden.[13]

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[13]If *Hawaiian Telephone* represented the proper interpretation of the benefit plan provision, a flood of litigation could be expected. In 1970 the average monthly benefit paid under private pension plans in the United States was $138. Kolodrubetz, *Two Decades Of Employee-Benefit Plans, 1950-1970 (A Review),* SOC. SEC. BULL., Vol. 35, No. 4 (April, 1972); *see also* INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, 1971, Comm. on Labor and Public Welfare, Subcomm. on Labor,

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The final decision worthy of notice is *Zinger v. Blanchette, supra,* 549 F.2d 901 (3rd Cir. 1977), which has been the subject of several comments earlier and which therefore requires little discussion here. The essence of the decision is that there is a distinction between discharge and retirement, and that ". . . [w]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. . . ."[14] 549 F.2d at 905. The court concluded that because the language of Section 4(a), 29 U.S.C. §623(a), which describes the prohibited employment practices, does not use the specific term "retirement," such a distinction was called for. As stated earlier, that supposition is wrong; the language of that subparagraph, and the language of the Act as a whole, unquestionably embrace retirement as a covered employment practice. *See supra,* n. 1; *cf. Peters*

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U.S. Senate, 92nd Cong., 1st Sess. (U.S. Govt. Printing Office, 1972), at 65-66, which found, in a study of 764 private pension plans, a median monthly benefit for normal retirement of $99 per month. While the trend is toward increasing benefit levels, Kolodrubetz, *supra* at 19, the fact that the figures mentioned above are averages illustrates the paucity of benefit levels for substantial numbers of retirees. In the absence of Social Security benefits, many pensioners would, under private pension plans, be reduced to destitution. It is clear, therefore, that the test suggested by *Hawaiian Telephone* would preclude early retirement in many cases, despite the language of a retirement or pension plan, and would spawn numerous suits litigating the question of what constitutes "substantial benefits" in particular cases.

[14]The court fails to mention just who generally regards retirement on an adequate pension with favor. With respect to employees who are healthy, capable, and desire to work, it is suggested that it is management which views early retirement with "an adequate" pension favorably. *See supra,* notes 3 and 13.

*Zinger* was followed with no comment by the same circuit in *Rogers v. Exxon Research and Engineering Co.,* 550 F.2d 834 (3rd Cir. 1977), which was decided the same day.



*v. Missouri Pacific Railroad Co., supra,* 483 F.2d 490 (5th Cir. 1973), *cert. denied,* 414 U.S. 1002 (1973). While the court purported to undertake a comprehensive analysis of the legislative history underlying the Act, it disregarded the most persuasive evidence of legislative intent expressed on the floor of Congerss following the committee hearings; indeed, based upon a single recorded sentence uttered by Senator Javits at a committee hearing, it imputed to him an intent which he subsequently expressly disavowed in remarks made at the time the Senate approved the Act. *See supra,* n. 6.

Therefore, it is respectfully submitted that the decision of the lower court is the first correct judicial analysis of the issue now before the Court. Decisions in conflict are characterized by fallacious reasoning, incorrect preconceptions and either a disregard of the appropriate constructional tools or their misapplication.

**Conclusion.**

While the most reasonable facial interpretation of the benefit plan provision is that involuntary retirement before the age of 65 was never envisioned, the language was apparently capable of breeding confusion, as the conflict among the circuits demonstrates. In an unsuccessful effort to forestall that possibility, Senator Javits, on the floor of the Senate, expressly attempted "to make its meaning clear to both employers and employees." In the House, Congressman Smith observed: "Since the language of sec. 4(f) is not clear, the language of the report is important." The Senator and the Congressman, with contributions from their respective colleagues, thereupon carefully explained that the

purpose of the provision was not to sanction involuntary retirement before the age of 65. Inexplicably, the Secretary of Labor, through an early interpretive regulation, disregarded that unequivocal expression of intention. Succeeding Secretaries, though not rescinding the regulation, repudiated the interpretation and even commenced several suits in behalf of individuals involuntarily retired pursuant to benefit plans. Under the circumstances, the various lower courts which approved early involuntary retirement under such plans were myopic at best. If, as the petitioner states in its petition for a writ of certiorari, "numerous employers face uncertainty as to the validity of their retirement plans," it is an uncertainty which they voluntarily assumed since one may suppose they had the benefit of legal advice. The petitioner's anguish over a supposed judicial surprise "without precedent" cannot be taken seriously. It is respectfully submitted the judgment of the lower court should be affirmed.

CYRIL F. BRICKFIELD, Esq.,
MILLER, SINGER, MICHAELSON,
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Of Counsel:
JONATHAN A. WEISS, Esq.,
Legal Services for the Elderly Poor,
ROBERT B. GILLAN, Esq.,
National Senior Citizens Law Center.

**EXHIBIT A.**

**Consent of Parties Obtained.**

UNITED AIRLINES

March 24, 1977

National Retired Teachers Association
The American Association of
Retired Persons

The Gray Panthers

Legal Services for the Elderly Poor

Attention: Robert B. Gillan, Esq.
National Senior Citizens Law Center
1709 W. 8th St., Suite 500
Los Angeles, California 90017

Re: *United Air Lines, Inc. v. Harris S. McMann*
U.S. Supreme Court No. 76-906

Gentlemen:

This will serve as the consent of United Air Lines, Inc. to the filing of a single brief, *amicus curiae,* on behalf of all or some of the addressee organizations, with the United States Supreme Court in the above titled action.

Very truly yours,

/s/ Earl G. Dolan
Earl G. Dolan
Attorney for:
UNITED AIR LINES, INC.

cc: Francis G. McBride, Esq.

HUNZ, McBRIDE & SALIBA, P.C.
Attorneys at Law
Suite 212—The Atrium
277 South Washington Street
Alexandria, Virginia 22314
(703) 836-5888

April 12, 1977

National Retired Teachers Association
The American Association of
Retired Persons

The Gray Panthers

Legal Services for the Elderly Poor

Attention: Robert B. Gillan, Esquire
National Senior Citizens Law Center
1709 W. 8th St., Suite 500
Los Angeles, Ca. 90017

Re: *United Air Lines, Inc. v. Harris S. McMann*
U.S. Supreme Court No. 76-906

Gentlemen:

This will serve as the consent of Harris S. McMann to the filing of a single brief, *amicus curiae,* on behalf of all or some of the addressee organizations, with the United States Supreme Court in the above titled action.

Very truly yours,

HUNZ, McBRIDE & SALIBA, P.C.
/s/ Francis G. McBride
Francis G. McBride

cc: Earl G. Dolan, Esq.



## EXHIBIT B.

### Retirement—A Medical Philosophy & Approach.

FOREWORD

*The AMA Committee on Aging is convinced that a sense of purpose and the opportunity to contribute to the well being of others are as vital to an individual's health as are adequate medical care, nutrition or rest. For this reason, the Committee is deeply concerned with policies which call for arbitrary retirement based on chronological age, without regard to individual desires and capabilities.*

*This paper summarizes the Committee's convictions as to the negative health effects of such compulsory job separation. It also suggests a medical system for determining physical and mental fitness for continued employment; a system which can be applied periodically over the employee's entire work life.*

*This paper does not attempt to discuss the social and economic factors which also bear on the question of retirement; it represents simply the medical philosophy of the Committee toward conservation and utilization of our most precious resource—human beings.*

/s/ Frederick C. Swartz, M.D.
Frederick C. Swartz, M.D.
Chairman, Committee on Aging

A. Medical Viewpoint

The increase in life expectancy and higher health levels will prove of little benefit to man if he is denied the opportunity to continue contributing of his skills at a certain chronological age, whether this be 45, 65 or 85 years.

It is the conviction of the American Medical Association Committee on Aging that such arbitrary retirement and denial of work opportunity—whether the work is for pay or the pleasure of giving—seriously threatens the health of the individual concerned. By way of emphasis, when we speak of "retirement" in this paper, we mean the complete separation of the man from his job.

Medicine, "the oldest of the professions in the sense that it comprises a group of men who not only share a common training in the relevant sciences and arts, but who also have adopted a code of practice and obligated themselves to perform a service to their fellow men," sees in retirement a direct threat to the health and life expectancy of the persons affected.

Medicine, more than any other discipline, is that knowledge which exists totally for the service of mankind. In the rendering of this service, the basic philosophy has always been to do good, and to do no harm. No matter where we start in the cycle of a generation, the aim of medicine has been to prolong living, to reduce and eliminate suffering, and—above all—to save lives.

The gnarled, runty, deformed child, the acutely and chronically ill, and the handicapped disabled oldster are the highest objects of medical attention, for within these warped receptacles resides that spark of infinity termed life.

The well and healthy are the concern of medicine for the same reason, for there is still much to be done before the race can be perfected. Every effort is made to assist each individual to achieve his maximum potential, to utilize his abilities for his own and the human community's greatest benefit.



From the beginning of life until its end, these objectives and motivations should continue to apply. Unfortunately, however, they apply only until a certain chronological age—most often 65—when forces outside of medicine inflict a disease—or disability-producing condition upon working men and women that is no less devastating than cancer, tuberculosis, or heart disease. This condition—enforced idleness—robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay. It robs the worker of his initative and independence. It narrows physical and mental horizons so much that the patient's final interests and compulsions are in grumbling about his complaints.

This condition has brainwashed thousands into the belief that at 65 one is over the hill. It has imposed the philosophy of the marketplace on the employee—a philosophy that substitutes, at an arbitrary chronological age, the concept "throw out all of the old and defective" for the dictum "to do good and to do no harm."

For these reasons, medicine is compelled to oppose retirement keyed to any chronological age, as detrimental to the best interests of the employee. To do otherwise would be to lose all to those who would gradually lower the age of these so-called retirement criteria until they would be applied at birth. The gnarled, the runty, the defective, like the gnarled, runty apples and oranges, would be graded out in the beginning. This approach might make medicine of the future

more simple, but it would certainly separate the "art" of medicine from the "science."

It is true that persons who have maintained broad interests throughout life and are financially secure could quite conceivably enjoy and benefit from the years following retirement. Insofar as these individuals continue to give of their abilities to others—insofar as their life still has a purpose other than self-gratification—they cannot be called "retired" in any real sense. They have re-directed rather than relinquished their channels for contribution.

The majority of persons, unfortunately, do not fall in this category. Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatsoever.

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person



is inactive and without basic interests. It is easy for the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms.

The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation.

Compulsory retirement produces a chain reaction in the health of such persons. It is a fact that the working man finds it difficult to accept the feeling of no longer being needed on the job. He loses contact with his work associates—many of whom may have been his closest friends—and is thrown back on the family.

Here, having a lesser part to play, he may experience loss of dignity and status. This is particularly so if his contributions to the family social circle previously have revolved solely or primarily around a recounting of his job experiences. The individual who has developed virtually no interests outside of those connected with his paycheck, who does not keep up with community affairs or dress up as he did when working, who can offer little to the family circle except his presence underfoot for 24 hours a day, may soon find himself isolated from the family itself. While isolation, per se, does not cause illness, it increases the chances of physical or emotional disturbance. It may also activate underlying neuroses, contribute to obesity and alcoholism and even precipitate an underlying tendency to suicide.

*Vital Statistics of the United States* and other sources report that suicides reach a peak in upper age brackets —after retirement normally occurs. The highest inci-

dence of suicide for white males occurs in the age group 70 years and over; for non-white males in the age group 60 and over. There is also a tendency for the person who commits suicide to do so after being isolated from society.

There may also be direct physical sequelae to the abrupt change in activity patterns. The nice nutritional adjustment to work which many individuals develop may be set awry on retirement The person whose physical and mental exercise has been solely or primarily connected with earning a living may exhibit a progressive disuse atrophy following job separation.

Whatever may be the precise percentage adversely affected by retirement, and physicians are convinced it is high, it is ill-advised to create additional problems for people by arbitrarily denying them one of mankind's principal avenues for self-satisfaction. For these reasons, the Committee on Aging decries the practice of retirement by the calendar without regard to individual capabilities or motivation.

B. Suggested Approach

It is the conviction of the Committee that any decision for or against retirement should rest on the same three fundamentals as does a decision for or against hiring:

(1) the individual's desire to work;
(2) the individual's ability to work; and
(3) the employer's need for the skill or ability which the individual offers—or is potentially able to offer.

These fundamental criteria would be applied at the time of employment, would operate over the employee's entire work life with the firm, and could form the



basis for a decision *at any time during this work life* for or against job reassignment, job retraining or job separation—whether in the form of retirement or dismissal.

Many of the reservations expressed about such individualized placement and retirement programs revolve around the second criterion listed above—the individual's ability to continue work—and around the development of methods by which to accurately measure this ability. Accordingly, this paper will attempt to (a) list some of the specific physical and mental characteristics which might be measured in assessing capability for continued work, and (b) suggest a general system for applying such measurements.

It should be re-emphasized that these measurements are not designed to be held "in abeyance" until a certain chronological age, and then applied periodically thereafter, but to be utilized at regular intervals throughout the employee's work life. As such, they may well assist in identifying the individual who should be replaced at 50 as well as one still capable at 90. The individual's physical and emotional status would dictate the frequency of such evaluations, and their results would of course be confidential between employee, employer and physician.

If such an individualized retirement system is to function with optimum effectiveness and benefit to both employee and employer, the firm involved will need to think in terms of hiring and utilizing an employee for his entire work life *potential* rather than just to fill a particular position or slot currently open in the organization. The firm will need to evaluate—and reevaluate—an employee's capabilities not only for the

position currently being filled, but for positions which may become available in the future. Such a personnel policy will be *employee- rather than job-centered,* and will entail greater attention to job analysis, employee training and re-training, and counseling programs within the firm.

Periodic evaluation of the employee's capabilities over his entire work life will be important in providing a base line from which to evaluate physical and mental capabilities at any time he is considered for retirement or job reassignment. Continuous employee counseling, too, will be an integral part of such a system, for a number of reasons. Counseling will be needed because a fluid rather than fixed separation date might otherwise find the worker unprepared emotionally, socially or financially. Individual interpretation may be needed to appropriately prepare the worker when retirement seems desirable. In cases where retirement is indicated, such counseling might delineate the other factors in addition to the individual's capabilities which would influence the decision for or against retirement, and thus help avoid his taking dismissal as a "failure to measure up." On the other hand, counseling may be needed in some instances to persuade an employee to *continue* working, when his own and the company's interests so indicate. Finally, counseling will be important in those cases where continued employment involves an adjustment in work status, pay and prestige for the employee. This may occur because of a decline in the employee's capabilities, or because of a decline in need for the employee's capabilities.

***There is no attempt here to imply that the employer owes a greater responsibility to older workers than***



***he does to those in any other age group.*** It would obviously be unrealistic, for example, to urge an employer to retain an older worker—no matter how highly proficient—if there were no further possible way of utilizing that worker's contribution or potential contribution. It is assumed, however, that employment and retirement practices would be based on conservation and fullest possible utilization of existing manpower—by selecting, placing, promoting and retraining employees on the basis of qualifications for the job. It is assumed also that employee training, re-training and counseling programs will assist the firm in achieving this objective.

Further, under the type of continuous program proposed in this report, the employee no longer needed in one firm may well secure quick employment in another, on the strength of the data developed on his capabilities and potentials over the years.

### C. Medical Evaluation

Basically, evaluation of an individual's capability for a particular job, whether his present position or an alternative available opening, would consist of matching an "Employee Profile" of those physical and mental capabilities susceptible to change over his work life, with a "Job Profile" of the same physical and mental requirements, using identical gradations for comparability. The following section lists some of the specific criteria which might be included in the Employee and the Job Profiles. ***It should be emphasized that this list of criteria is not all-inclusive or exclusive; nor are the gradations specified necessarily the most meaningful.***

*The material is intended only to be suggestive of an over-all system for making such evaluations.**

1) Physical Criteria
   - Strength and endurance .....(S)
   - Mobility—range of motion .....(M)
   - Dexterity .....(D)
   - Coordination .....(C)
   - Vision .....(V)
   - Hearing .....(H)
   - Equilibrium .....(E)

The first four characteristics might be evaluated separately for:

- Forearm and hand .....(F)
- Upper extremities—upper arm, shoulder girdle and back .....(U)
- Lower extremities—feet, legs, pelvic girdle and lower back .....(L)

2) Mental Criteria
   - Concentration .....(C)
   - Analytical ability .....(A)
   - Judgment .....(J)
   - Flexibility .....(F)
   - Initiative .....(I)
   - Ability to work effectively with others .....(P)

A numerical gradation or scale could then be established for each of the above criteria. For example, under (S)—Strength and endurance—a scale of 1 through 4 might be established as follows:

1—Able to perform maximum sustained effort over long periods

*Adapted from the U.S. Army Physical Profile Serial system, (PULHES), used to assess the functional ability of individuals to perform military duties.



2—Able to perform sustained effort over long periods

3—Able to perform sustained effort over moderate periods

4—Unable to perform sustained effort

Similar gradations would be established for other criteria.

Using this system, a "Job Profile" would be established for each position under consideration, and would be reviewed periodically in the light of changing requirements within the firm. Thus, a hypothetical Job Profile of requirements for the position of tool and die maker might look somewhat as follows:

Physical

S (Strength and endurance) ..... (F-2) (U-2) (L-3)

M (Mobility—range of motion) ..... (F-1) (U-1) (L-2)

D (Dexterity) ..... (F-1) (U-1) (L-3)

C (Coordination) ..... (F-1) (U-1) (L-3)

V (Vision) .....1

H (Hearing) .....3

E (Equilibrium) .....1

Mental

C (Concentration) .....1

A (Analytical ability) .....1

J (Judgment) .....3

F (Flexibility) .....2

I (Initiative) .....3

P (Ability to work effectively with others) .....3

A comparable Employee Profile would then be developed and updated periodically thereafter for the individual, through an evaluation of his physical and mental capabilities by his own and the plant physician, combined with a rating by his supervisor and the personnel department on certain aspects of the Profile. Many of the Employee Profile capabilities—mobility, strength and endurance, for example—will require and be directly susceptible to objective medical evaluation; others such as analytical ability, judgment, ability to work effectively with others, etc., may be more amenable to rating by the supervisor or personnel department, or to measurement by testing procedures. The methods for measuring various facets of the Employee Profile will need to be worked out in detail, utilizing accepted testing and evaluation procedures as far as possible.

The methods developed should be generally standardized and accepted between different employers, to permit comparability of results.

Of particular importance in periodic evaluation of the more "intangible" capabilities such as flexibility, judgment, and the like will be a concurrent assessment of employee *motivation*, in order to distinguish between decline in these capabilities, and a decline in *desire to use* these capabilities. This is more than an academic distinction, since it may make the difference between retirement—for cause outside the employee's control—and separation—for cause within the employee's control.

To offset normal variations in employee performance from one day to the next, as well as the fluctuation resulting from increased motivation at the time of testing, it would probably be advisable to evaluate some



of the employee characteristics over a period of time, rather than at a particular point in time. A periodic comparison of Job and Employee Profiles would then provide some quantitative frame of reference from which to consider the individual's suitability for continued employment.

No attempt is made in this report to suggest a minimum rating level below which the employee would be disqualified for continued employment. It would be fallacious to presume that simple comparison of Employee Profile with Job Profile will provide a cut-and-dried answer in itself; additional factors will influence the decision as to what constitutes an acceptable "score" on the Employee-versus-Job Profile.

The physician, in making a recommendation for or against continued employment on the basis of health, will have to consider not only the individual's present physical capabilities for the job in question, but also the presence of currently non-disabling physical or mental disorders which might be exacerbated by job demands. Other factors needing consideration include the individual's potential for training or re-training in alternative job skills, the importance of work as a source of status for the individual, and the extent to which mental health will be fostered by continued employment.

The employer will want to consider not only the physician's recommendation, the demand for skills of the employee under consideration, the firm's investment in the employee, and his current and predicted job performance, but also his potential value to the firm

in future years, in terms of new products or services to be developed.

In the final analysis, it is the Committee's conviction that the decision for or against retirement, just as the decision for or against hiring, should be an individual one, in terms of a specific employee, in a specific firm, at a specific time.